No. 91-1738-CFY
Status: GRANTED

Title: Jerry D. Gilmore, Petitioner
v.
Kevin Taylor

Docketed:
April 27, 1992

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Zick,Steven J.

Counsel for respondent: Agostinelli,Robert, Marshall,Lawrence C.

04-14-92 ext til 4-27-92, Stevens, J.- CITED; Ptn mailed 04-27-92, rcd 04-29-92

Entry	Date	Note	Proceedings and Orders
1	Apr 14 1992	G	Application (A91-752) to extend the time to file a petition for a writ of certiorari from April 20, 1992 to April 27, 1992, submitted to Justice Stevens.
2	Apr 14 1992		Application (A91-752) granted by Justice Stevens extending the time to file until April 27, 1992.
3	Apr 27 1992	G	Petition for writ of certiorari filed.
5	May 26 1992		Waiver of right of respondent Kevin Taylor to respond filed.
4	May 27 1992		DISTRIBUTED. June 12, 1992
6	Jun 9 1992	P	Response requested -- WHR. (Due July 9, 1992)
7	Jul 8 1992		Brief of respondent Kevin Taylor in opposition filed.
8	Jul 8 1992	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Jul 15 1992		REDISTRIBUTED. September 28, 1992
10	Aug 20 1992	X	Reply brief of petitioner filed.
12	Oct 5 1992		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
13	Oct 5 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
16	Nov 6 1992		Record filed.
		*	Original proceedings Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois (Box)
15	Nov 20 1992		Order extending time to file brief of petitioner on the merits until November 30, 1992.
18	Nov 23 1992		Brief amicus curiae of Criminal Justice Legal Foundation filed.
17	Nov 24 1992	G	Motion of respondent for appointment of counsel filed.
19	Nov 30 1992		Brief of petitioner Jerry D. Gilmore filed.
20	Nov 30 1992		Joint appendix filed.
21	Dec 7 1992		Motion for appointment of counsel GRANTED and it is ordered that Lawrence C. Marshall, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the respondent in this case.
22	Dec 28 1992		SET FOR ARGUMENT TUESDAY, MARCH 2, 1993. (3RD CASE).
23	Jan 7 1993		Brief amici curiae of American Civil Liberties Union, et al. filed.
24	Jan 8 1993		Brief amicus curiae of Nicholas deB Katzenbach, et al. filed.

No. 91-1738-CFY

Entry	Date	Note	Proceedings and Orders
25	Jan 8 1993		Brief of respondent Kevin Taylor filed.
26	Jan 15 1993		CIRCULATED.
28	Feb 4 1993	G	Application (A92-592) extension of time to file reply brief on the merits from February 8, 1993 to February 12, 1993., submitted to Justice Stevens.
29	Feb 5 1993		Application (A92-592) granted by Justice Stevens extending the time to file until February 12, 1993.
30	Feb 8 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit.
31	Feb 12 1993	X	Reply brief of petitioner filed.
32	Mar 2 1993		ARGUED.

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APR 27 1992
OFFICE OF THE CLERK

91-1738

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois

TERENCE M. MADSEN
Assistant Attorney General

MARK E. WILSON
Assistant Attorney General

STEVEN J. ZICK
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2139

Counsel for Petitioner

Printed by Authority of the State of Illinois (P.O. 35432—60—4-27-92)

QUESTIONS PRESENTED

An Illinois jury, instructed with pattern jury instructions on murder and voluntary manslaughter, found Kevin Taylor guilty of murder on March 18, 1986. In *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), the Seventh Circuit held that use of the twenty-year-old pattern instructions violated the fourteenth amendment's due process clause because the instructions permitted a jury to find murder without considering evidence to support voluntary manslaughter, a lesser offense, as provided by state law. In *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992), the decision below, the Seventh Circuit held that *Falconer v. Lane* did not announce a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989), thereby permitting Taylor to take advantage of *Falconer*'s holding retroactively in this habeas corpus action.

This petition presents the following questions for review:

1. Did the Seventh Circuit err by holding that existing precedent "dictated" *Falconer*'s holding under *Teague v. Lane* even though (a) many earlier decisions from the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and federal district courts irreconcilably conflict with *Falconer* on the constitutionality of the pattern instructions, (b) *Falconer* radically extends criminal defendants' due process rights by effectively requiring correct jury instructions on affirmative defenses provided by state law, and (c) other circuit courts have expressly rejected the *Falconer* court's reasoning?

2. Did the Seventh Circuit err by considering this jury instruction error "inherently prejudicial"?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on January 21, 1992.

OPINIONS BELOW

The February 2, 1987, decision of the Illinois Appellate Court is unpublished. The March 31, 1989, decision of the Illinois Appellate Court is published at 181 Ill. App. 3d 538, 536 N.E.2d 1312 (4th Dist. 1989). The December 19, 1990, decision of the United States District Court for the Central District of Illinois is unpublished. The January 21, 1992, decision of the United States Court of Appeals

for the Seventh Circuit is reported at 954 F.2d 441 (7th Cir. 1992). All these decisions are reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on January 21, 1992. On April 14, 1992, Justice Stevens granted the Petitioner's motion for an extension of time to file this petition from April 20, 1992, to and including April 27, 1992. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case puts in issue the fourteenth amendment's due process clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. The case also puts in issue 28 U.S.C. § 2254 (1988): "The Supreme Court, a Justice, thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

STATEMENT OF THE CASE

I. Taylor's Criminal Trial and Appeal.

An Illinois jury found Kevin Taylor guilty of murder and home invasion under Illinois law on March 18, 1986. The court sentenced Taylor to thirty-five years in prison. Taylor appealed to the Illinois Appellate Court, arguing that the pattern jury instructions used at his trial on murder and the lesser offense of voluntary manslaughter violated state law. The court affirmed, finding that he had waived this issue (App. 38). The Illinois Supreme Court denied Taylor's petition for leave to appeal.

II. Taylor's State Post-Conviction Hearing and Appeal.

Taylor then filed a petition for post-conviction relief under the Illinois Post-Conviction Hearing Act, arguing that he was denied effective assistance of counsel in violation of the sixth amendment because his trial lawyer did not object to the instructions on murder and voluntary manslaughter. The state trial court denied his petition, so Taylor again appealed to the Illinois Appellate Court. After Taylor filed his appeal, the Illinois Supreme Court issued its opinion in *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), which appeared to invalidate the pattern murder and voluntary manslaughter instructions used at Taylor's trial on state law grounds.

The Illinois Appellate Court denied Taylor's petition for post-conviction relief. The court held that *Reddick* would have required reversal on direct review because *Reddick* invalidated the pattern jury instructions on state law grounds. The court held, however, that *Reddick* did not invalidate the instructions on constitutional grounds.

Because prisoners may only receive post-conviction relief in Illinois for constitutional error, the court affirmed (App. 41-42). The Illinois Supreme Court denied Taylor's petition for leave to appeal from this judgment on October 5, 1989.

III. Taylor's Federal Habeas Corpus Proceeding.

Taylor proceeded to federal court, filing a petition for a writ of habeas corpus in the United States District Court for the Central District of Illinois. The court denied Taylor's petition. Although the court noted that the Seventh Circuit's recent decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), held that *Reddick* errors did in fact violate the fourteenth amendment's due process clause, contrary to the Illinois Appellate Court's holding in Taylor's state post-conviction relief proceeding, the court held that *Reddick* constituted a "new rule" of criminal procedure that could not be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989) (App. 29-32). The court principally relied upon *People v. Flowers*, 138 Ill. 2d 218, 561 N.E.2d 674 (1990), in which the Illinois Supreme Court explicitly adopted the *Teague* retroactivity analysis for state post-conviction relief proceedings and held that *Reddick* announced a new constitutional rule under *Teague*.

The United States Court of Appeals for the Seventh Circuit reversed (App. 1-24). It noted that its previous decisions had cast doubt on why a *Reddick* error violated the federal due process clause. The court held, directly contrary to the Illinois Supreme Court's *Flowers* decision (without even citing it), that *Reddick* did not announce a constitutional rule at all. Rather, the Seventh Circuit found that its own decision in *Falconer* (as clarified by its decision in this case) first held that *Reddick* errors violated the due process clause. The court reasoned, therefore, that the appropriate *Teague* inquiry asks whether *Falconer*, not *Reddick*, announced a new rule. The court found that *Falconer* did not announce a new rule under *Teague* and applied it retroactively to Taylor's conviction. Finding the pattern instructions "inherently prejudicial," the court held that use of the instructions in Taylor's case was not harmless beyond a reasonable doubt.

Jerry D. Gilmore, Warden of Taylor's prison, seeks a writ of certiorari from this Court to review this judgment and opinion of the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

The decision below has ominous national implications. In this habeas corpus action, the Seventh Circuit retroactively applied an earlier case that invalidated, on novel constitutional grounds, pattern murder jury instructions that state and federal courts had considered constitutional for twenty years. In doing so, the court severely limited the scope of *Teague v. Lane*, 489 U.S. 288 (1989), in which the Court held that a case announces a "new rule" when "the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301 (plurality opinion). The Court should review this issue to reverse the Seventh Circuit's momentous decision below and to resolve a circuit split on the proper scope of the due process clause.

The lower court's harmless error decision also requires reversal because it fundamentally misapplies harmless error analysis. The Seventh Circuit called the pattern instructions "inherently prejudicial" despite a long line of

decisions from this Court holding that jury instruction error does not require per se reversal on habeas corpus review. *Taylor v. Gilmore*, 954 F.2d 441, 454 (7th Cir. 1992) (App. 23). If allowed to stand, the decision below effectively clears the way for hundreds of convicted murders to by-pass the harmless error standard for this jury instruction error. This Court should prevent such a calamity from occurring by reversing the Seventh Circuit's incorrect decision below.

I.

FALCONER v. LANE, 905 F.2d 1129 (7th Cir. 1990), RADICALLY AND UNPREDICTABLY EXTENDED CONSTITUTIONAL LAW BY GRANTING CRIMINAL DEFENDANTS A DUE PROCESS RIGHT TO CORRECT JURY INSTRUCTIONS ON AN AFFIRMATIVE DEFENSE.

In holding that *Falconer v. Lane* announced an old rule that applies retroactively, the Seventh Circuit dismissed rank confusion in the state and federal courts about why these twenty-year-old pattern jury instructions used at Taylor's trial might violate the constitution. Indeed, the Seventh Circuit frankly conceded below that the "precise nature" of the constitutional infirmity had not been "free from doubt" until its decision in this case, and that the Seventh Circuit itself had a "hand in creating this doubt" by its holding in earlier cases. 954 F.2d at 448 (App. 13). These facts alone establish that *Falconer* announced a new rule under *Teague v. Lane*. Moreover, even if *Falconer* correctly revealed a constitutional problem with these instructions, no decision of this Court "dictated" that result. To the contrary, *Falconer* oppugns a line of cases from this Court which establish that criminal defendants have no due process right to affirmative defense instructions required by state law. Furthermore, *Falconer* is patently inconsistent

with cases from other circuits that have relied on this same line of cases when faced with similar issues. *Falconer* established a starkly new rule of criminal procedure which the court should not have applied retroactively to Taylor's conviction.

A federal court generally cannot grant habeas corpus relief to a prisoner based on a "new rule" of criminal procedure announced by a court after the prisoner's conviction became final. *Teague v. Lane*, 489 U.S. at 301 (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989). A decision announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. *Stringer v. Black*, 112 S. Ct. 1130, 1135 (1992). If "reasonable jurists may disagree" as to whether an earlier decision "dictates" a later one, then the later decision announced a "new rule" under *Teague*. *Sawyer v. Smith*, 110 S. Ct. 2822, 2827 (1990). As the Court explained in *Butler v. McKellar*, 494 U.S. 407 (1990), "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Id.* at 414. Under these settled principles, the Seventh Circuit erred by holding that *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), announced an old rule that it could apply retroactively to Taylor's conviction.

A. The Pattern Jury Instructions at Issue.

Under the Illinois Criminal Code of 1961 (the "Code"), a person committed murder if he killed someone with an intent to kill or commit great bodily harm. Ill. Rev. Stat. ch. 38, ¶ 9-1 (1985). In another statutory section, the Code also provided for a lesser crime of voluntary manslaughter.

Ill. Rev. Stat. ch. 38, ¶9-2 (1985). A person committed voluntary manslaughter rather than murder if the evidence established the two elements of murder noted above as well as a "mitigating circumstance." *See People v. Reddick*, 123 Ill. 2d 184, 193-97, 526 N.E.2d 141, 144-45 (1988). The Code provided for two mitigating circumstances: (a) that the defendant killed while acting under sudden and intense passion resulting from serious provocation, or (b) that the defendant had an unreasonable belief at the time of the killing that he had to protect himself. Ill. Rev. Stat. ch. 38, ¶9-2.[1]

In *Reddick*, the Illinois Supreme Court held that the mitigating circumstances described in the Code were partial affirmative defenses to a murder charge. *Reddick*, 123 Ill. 2d at 195-96, 526 N.E.2d at 145-46. The court held that defendants have the burden of producing evidence to warrant the instruction on voluntary manslaughter, but once the defendant raised the issue, the State had the burden of disproving the existence of the mitigating circumstance beyond a reasonable doubt. *Id.*, 123 Ill. 2d at 197, 526 N.E.2d at 146. The pattern jury instructions on these crimes—first published in 1968 and likely used in hundreds of criminal trials—did not accurately reflect the burdens of proof that the *Reddick* court announced. Accordingly, the *Reddick* court invalidated them. *Id.*, 123 Ill. 2d at 197, 526 N.E.2d at 146. Taylor's jury was instructed with the same instructions invalidated on state law grounds in *Reddick*.

[1] If the defendant had a *reasonable* belief that he had to defend himself (*i.e.*, if he acted in self-defense), a separate section of the Code provided for full acquittal. Ill. Rev. Stat. ch. 38, ¶7-1 (1985).

B. State and Federal Courts Have Disagreed Radically on the Constitutionality of the Instructions Invalidated in *Reddick*.

Since *Reddick*, federal and state courts, including the Seventh Circuit itself as well as the Illinois Supreme Court, have issued markedly inconsistent opinions as to whether *Reddick* errors violate the due process clause. Because disagreement among reasonable jurists requires a finding that a constitutional principle is "new" under *Teague*, *Falconer* announced a new rule. *Sawyer*, 110 S. Ct. at 2827.

Before the Seventh Circuit decided *Falconer*, many courts held that a *Reddick* error did not violate the due process clause. These courts typically reasoned that, if anything, a *Reddick* error deprived a defendant of an affirmative defense, and the due process clause does not guarantee defendants the right to receive an affirmative defense instruction. *See, e.g., People v. Bolden*, 181 Ill. App. 3d 481, 487-88, 536 N.E.2d 1308, 1311-12 (4th Dist.), *appeal denied*, 542 N.E.2d 116 (Ill. 1989); *People v. Taylor*, 181 Ill. App. 3d 538, 540, 536 N.E.2d 1312, 1313 (4th Dist.), 545 N.E.2d 127 (Ill. 1989); *United States ex rel. Fleming v. Gramley*, 735 F. Supp. 302, 305-08 (C.D. Ill. 1990), *rev'd sub nom. United States ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991). *See also People v. McGee*, 110 Ill. App. 3d 766, 775, 443 N.E.2d 1057, 1063-64 (2d Dist. 1982) (affirming convictions on direct review after trials using the pattern instructions); *People v. Howard*, 139 Ill. App. 3d 755, 760-61, 487 N.E.2d 656, 660-61 (2d Dist. 1985) (same). As the *Bolden* court explained, "No United States Supreme Court case has held that due process is denied when an imperfect instruction is given in regard to an included offense." 181 Ill. App. 3d at 487, 536 N.E.2d at 1312.

Other courts, however, including the Seventh Circuit and the Illinois Supreme Court, disagreed with this reasoning. These courts held that the *Reddick* court reversed on constitutional rather than state law grounds even though the instructions related to an affirmative defense. *See, e.g., Falconer v. Lane*, 905 F.2d at 1134 & n.5; *People v. Flowers*, 138 Ill. 2d 218, 235-37, 561 N.E.2d 674, 680-81 (1990); *People v. Shields*, 143 Ill. 2d 435, 442-43, 575 N.E.2d 538, 542 (1991); *People v. Brooks*, 175 Ill. App. 3d 136, 142, 529 N.E.2d 732, 736 (1st Dist. 1988), *appeal denied*, 124 Ill. 2d 557, 535 N.E.2d 916 (1989). These courts either held or strongly suggested that *Reddick* itself announced a due process holding, because the *Reddick* court considered the jury instruction error to violate a defendant's alleged fundamental right to accurate jury instructions. As the *Falconer* court stated, "[a]lthough the *Reddick* Court itself did not use the magic words 'due process' as the petition did, the Court obviously considered the errors resulting from the invalid instructions to be of constitutional magnitude." 905 F.2d at 1134. The court explicitly approved of various Illinois Appellate Court decisions, including *People v. Brooks*, which held that *Reddick* announced a constitutional rule because "[t]he right of an accused to have the State prove all the elements of his alleged crime is incontestably of constitutional dimension." *Brooks*, 175 Ill. App. 3d at 142, 529 N.E.2d at 736 (citation omitted). *See Falconer*, 905 F.2d at 1134 & n.5 (adopting *Brooks* and other Illinois Appellate Court decisions).

As the Seventh Circuit later recognized, however, "an ambiguity exist[ed] as to the precise nature of the due process violation." *United States ex rel. Fleming v. Huch*, 924 F.2d 679, 682 (7th Cir. 1991). In particular, earlier statements in the Seventh Circuit's decisions never clarified exactly why *Reddick* errors did not merely violate state law since, at most, they deprived a defendant of his state-law right to present an affirmative defense. *See Patterson v. New York*, 432 U.S. 197, 210 (1977) (state need not "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused"); *Engle v. Isaac*, 456 U.S. 107, 119-21 (1982) (jury instruction error could not be challenged on habeas review because it related to an affirmative defense, not an element of the crime); *Martin v. Ohio*, 480 U.S. 228, 233 (1987) (states may shift burden of proving self-defense to accused in homicide case). *See infra* § I.C., pp. 14-18.

Only in the decision below did the Seventh Circuit finally clarify why it believed that using these instructions violated the constitution. The court held that constitutional error occurred because (a) a reasonable likelihood existed that the jury applied the challenged instruction in "an invalid manner," and (b) the jury might not have "weigh[ed] evidence that may have led to an acquittal on the charge of conviction." 954 F.2d at 452-53 (App. 21). This novel holding went far beyond the earlier, irreconcilable efforts to resolve this issue by the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court, and federal district courts in Illinois. Because many reasonable jurists had addressed this issue but had arrived at divergent results, the opinion below was not "dictated" by existing precedent, and was necessarily a new rule under *Teague*.

The decision below states that other courts had not "disagreed with the ruling . . . subsequently handed down in *Falconer*." 954 F.2d at 451 (App. 18). The court did not acknowledge, however, many of the opinions cited above. For example, the court did not even mention the contrary results

in *Bolden* or even in *Taylor*, Kevin Taylor's post-conviction proceeding that preceded this habeas corpus action. Moreover, the court did not consider the confusion appearing in its own decisions and in the Illinois Supreme Court's decisions as evidence that "reasonable jurists may disagree" over the proper resolution of this difficult issue. *Sawyer v. Smith*, 110 S. Ct. at 2827. The court should have considered these irreconcilable decisions and found that *Falconer* announced a new rule.

The court compared only three earlier decisions and believed that they did not suggest that *Falconer* announced a new rule. The court erred in this analysis. The court first discussed *United States ex rel. Fleming v. Gramley* (the district court's opinion reversed by *United States ex rel. Fleming v. Huch)*, stating that the court "never reached, even tangentially, the central issue decided in *Falconer*." 954 F.2d at 451 (App. 19). The court was wrong. The *Fleming* district court held that the jury instructions did not "so infect the entire trial that the resulting conviction violates due process." 735 F. Supp. at 308. *Falconer* held just the opposite. *See Falconer*, 905 F.2d at 1135-36 (finding that the instructions infected the entire trial sufficiently to violate due process); *Rose v. Lane*, 910 F.2d 400, 401-02 (7th Cir.), *cert. denied*, 111 S. Ct. 515 (1990) (*Falconer* held that "the instructions were gravely erroneous and denied the defendant due process of law").

The court also attempted to distinguish *People v. McGee* and *People v. Howard*, both Illinois Appellate Court decisions upholding convictions after trials in which the pattern instructions were used, stating that their holdings rest on state law "and hence are not evidence of a pre-*Falconer* difference of opinion." 954 F.2d at 452 (App. 19) (citing *Sawyer v. Smith*, 110 S. Ct. at 2829-31). This reasoning, however, turns *Sawyer's* holding on its head.

In *Sawyer*, the petitioner argued that a long line of state-law decisions in his favor indicated that the constitutional rule he was proposing was an old rule. 110 S. Ct. at 2829. The Court rejected that argument, noting that his reliance on state law for this purpose "misapprehends the function of federal habeas corpus. . . . Federal habeas corpus serves to ensure that state convictions comport with the *federal* law that was established at the time the petitioner's conviction became final." 110 S. Ct. at 2830 (citations omitted). The Court held that it would not rely on state law to find an old constitutional rule in that case.

Contrary to the Seventh Circuit's opinion below, the Court's reasoning in *Sawyer* strongly suggests that *Falconer* announced a new rule. When state courts affirm convictions, they hold, at least implicitly, that the "convictions comport with the federal law that was established at the time the . . . conviction became final." *Sawyer*, 110 S. Ct. at 2830. The *McGee* and *Howard* courts would have reached different results if the Seventh Circuit had decided *Falconer* before them. *McGee* and *Howard* strongly suggest, therefore, that those courts believed the instructions were constitutional. *Falconer's* contrary decision must be a new rule, because it invalidated reasonable judges' earlier understandings of what the due process clause required regarding these instructions.

In holding that *Falconer* did not constitute a new rule under *Teague*, the Seventh Circuit has effectively declared that earlier opinions of the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and the federal district court were products of unreasonable jurists. *Sawyer*, 110 S. Ct. at 2827; *Butler v. McKellar*, 494 U.S. 407, 415 (1990). This holding cannot stand. These earlier courts did not reach divergent opinions because the judges were "unreasonable"; to the contrary, the opinions differ

because the courts were simply grappling with how best to apply existing precedent, which does not squarely resolve the constitutional question presented by these pattern instructions. Accordingly, *Falconer* presented a quintessentially new rule under *Teague*. This Court should issue a writ of certiorari to correct the Seventh Circuit's error and to preclude the federal courts from applying *Falconer*'s novel holding to potentially hundreds of long-final murder convictions in Illinois.

C. *Falconer* Radically Extends Criminal Defendants' Due Process Rights by Effectively Requiring Correct Jury Instructions on Affirmative Defenses Provided by State Law.

The *Falconer* court held that use of these instructions violated Taylor's right to due process of law despite *Patterson v. New York*, 432 U.S. 197 (1977), *Engle v. Isaac*, 456 U.S. 107 (1982), and *Martin v. Ohio*, 480 U.S. 228 (1987), all of which strongly suggest that he had no such due process right. Indeed, two circuits have rejected arguments that the Seventh Circuit applied in this case specifically because of the *Patterson*-line of cases. *See infra* § I.D., pp. 18-20. Even if the Seventh Circuit correctly decided *Falconer*, therefore, *Falconer* announced a new rule because it went far beyond earlier pronouncements of this Court on the scope of a criminal defendant's due process rights to an affirmative defense jury instruction.

Since *Patterson v. New York*, this Court has held, apparently uniformly, that in noncapital cases the due process clause requires proof beyond a reasonable doubt of the elements of a charged offense, but affirmative defenses are matters of state law. In *Patterson*, for example, the Court held that a state could legitimately, under the due process clause, place the burden of proof of an affirmative

defense upon a defendant. 432 U.S. at 205-11. Similarly, in *Engle v. Isaac*, the Court held that jury instructions that violated state law by placing the burden of proof of an affirmative defense upon a defendant did not violate the due process clause. 456 U.S. at 119-21. Lastly, in *Martin v. Ohio*, the Court held that a state may place the burden of proof of an affirmative defense on a defendant even if evidence that supports the affirmative defense would negate one of the elements of the charged offense. 480 U.S. at 233-36.

Falconer and the opinion below contradict the rationale of these cases. If the due process clause allows states to convict defendants with jury instructions that misallocate the burden of proof on an affirmative defense (*Engle v. Isaac*, 456 U.S. at 119-21), then the due process clause should also allow states to convict defendants with instructions that effectively deprive a defendant of an affirmative defense. *Falconer* and the decision below announce holdings directly contrary to this reasoning. Even if *Falconer* is correct, therefore, *Engle*, *Patterson* and *Martin* dispel any possibility that existing precedent "dictated" the *Falconer* holding.

The lower court relied on *Connecticut v. Johnson*, 460 U.S. 73 (1983), to hold that "permitting a jury to reach a murder verdict without considering evidence that would warrant mitigation to voluntary manslaughter . . . violates due process." 954 F.2d at 453 (App. 22). As the court itself recognized, however, *Johnson* involved instructions on an element of a crime, not an affirmative defense. *Id.* The court considered this distinction from *Johnson* "insignificant," however, stating:

> What ultimately mattered in *Johnson* was that the jury could not weigh evidence that may have led to an acquittal on the charge of conviction—regardless

> of whether the evidence related to an element of the crime or an affirmative defense. In a state that defines manslaughter and murder as separate crimes, and at a trial where a defendant is constitutionally entitled to voluntary manslaughter instructions, a homicide committed under a sudden and intense passion is no more a murder than a homicide committed without the intent to kill.

Id. (App. 22-23). This passage misapplies the law for at least three reasons.

First, to the extent that the instructions might have prevented the jury from acquitting Taylor of murder even though he presented evidence of an affirmative defense, the instructions only violated state law. The due process clause does not place on a state the burden of proving the absence of an affirmative defense, even if the existence of the affirmative defense might negate an element of the charged crime. *Martin v. Ohio*, 480 U.S. at 233-36. It necessarily follows that a defendant has no due process right to have a jury consider evidence that is only relevant to an affirmative defense.

Second, the court cites no authority for the proposition that Taylor was "constitutionally entitled to voluntary manslaughter instructions." 954 F.2d at 453 (App. 23). This Court has apparently never held that criminal defendants have such a right in noncapital cases. *See Beck v. Alabama*, 447 U.S. 625, 637 (1980) (noting that the Court has "never held that a defendant is entitled to a lesser included offense instruction as a matter of due process").

Third, although the court correctly states that a homicide committed "under a sudden and intense passion is no more a murder than a homicide committed without the intent to kill" (954 F.2d at 453 (App. 23)), the issue in the case was not whether the defendant committed murder; the issue

was whether the jury instructions, by impinging upon Taylor's affirmative defense case, violated the constitution. Whether the evidence established murder under state law is a fundamentally different question from whether the constitution required that the instructions permit the jury to consider that evidence.

The Seventh Circuit also justified its holding on another line of cases from this Court which control the scope of habeas review of improper jury instructions. The court below never acknowledges, however, that this Court has apparently never applied this second line of cases to instructions that effectively deprive a defendant of only an affirmative defense.

The due process clause requires a new trial when "an ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). In reviewing jury instructions, a collateral court must assess "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). The Seventh Circuit purported to apply this rule in this case, but restated the *Boyde* test in a novel and expansive way. Rather than asking whether Taylor's jury was likely to have applied the instruction "that prevents its consideration of constitutionally relevant evidence," as the Court stated in *Boyde*, the court below inquired whether the jury was likely to have applied the instruction "in an invalid manner," by which it meant in a manner that deprived Taylor of an affirmative defense permitted by state law. 954 F.2d at 452-53 (App. 21).

This slight difference in wording makes the Seventh Circuit's holding radical indeed. A *Reddick* error prejudices

a defendant because the instructions effectively prevent a jury from considering, as required by state law, the lesser crime of voluntary manslaughter as an alternative to murder. *Falconer*, 905 F.2d at 1136. But, as this Court established in *Patterson* and later cases, defendants have no due process rights to jury instructions on affirmative defenses in noncapital cases. *Engle v. Isaac*, 456 U.S. at 119-21; *Patterson v. New York*, 432 U.S. at 210; *Martin v. Ohio*, 480 U.S. at 233. It may have been "invalid" under *state* law for the pattern instructions to prevent Taylor's jury from considering evidence of voluntary manslaughter; such evidence is plainly not, however, "constitutionally relevant evidence" under *Patterson*.

D. Other Circuit Courts Have Expressly Rejected the *Falconer* Court's Reasoning.

At least two circuits have properly rejected the reasoning contained in the lower court's restatement of the *Falconer* holding specifically because of *Patterson* and its progeny. This circuit split illustrates the national dilemma posed by the decision below. In at least two circuits, criminal defendants have no right to correct jury instructions relating to an affirmative defense in any circumstance because affirmative defenses are the subject of state law under *Patterson*. The Seventh Circuit declared below, however, that criminal defendants not only have such a right despite *Patterson*, but that the existence of this due process right was dictated by this Court's precedent. This Court should grant certiorari to correct the Seventh Circuit's error and resolve the split in the circuits over this fundamental rule of criminal procedure.

Both the Sixth and the Ninth Circuits have rejected the reasoning applied by the court below. In *Allen v. Redman*, 858 F.2d 1194 (6th Cir. 1988), for example, the

habeas petitioner argued that his state jury instruction on the affirmative defense of insanity was incorrect in that it permitted the jury to convict him of the charged crime without considering his sanity. He argued that the instruction completely "infected" the trial so as to deprive him of due process under *Cupp*. The court rejected his argument, holding that "the language from *Cupp*, stating that the 'resulting conviction violates due process,' brings the analysis . . . back to whether sanity is an element of the crimes involved." 858 F.2d at 1200. Because sanity was not an element of the charged crime, the *Cupp-Boyde* rule did not apply in the petitioner's case. *Id. See also Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987) (confusing jury instructions on an affirmative defense to murder could not violate due process).

Similarly, in *Walker v. Endell*, 850 F.2d 470 (9th Cir.), *cert. denied*, 488 U.S. 926 & 981 (1988), the petitioner argued that due process required correct instructions on "criminal recklessness." *Id.* at 475-76. Criminal recklessness only negated the defense of duress, however, which was not an element of the charged crime. *Id.* at 476. Accordingly, the court held that "the failure to give an instruction defining recklessness is at most an error of state law." *Id.*

Walker, *Wood* and *Allen* all reach the opposite conclusion of the court below, *i.e.*, that confusing or incorrect jury instructions that at most deprive a defendant of an affirmative defense can still violate the due process clause. Given this dispute among reasonable jurists as to the scope of due process limitations on incorrect affirmative defense jury instructions, *Falconer's* holding (as clarified in the decision below) constitutes a new rule under *Teague*.

This Court's grant of certiorari would allow it to resolve this circuit conflict over the scope of the due process clause.

II.

THE SEVENTH CIRCUIT ERRED BY HOLDING THAT USE OF THE PATTERN INSTRUCTIONS IS "INHERENTLY PREJUDICIAL."

The lower court held that use of the pattern instructions is "inherently prejudicial" to a criminal defendant, making it extremely difficult for a federal habeas corpus court ever to find harmless error. *Taylor*, 954 F.2d at 454 (App. 23-24). As this Court held in *Rose v. Clark*, 478 U.S. 570 (1986), and recently reaffirmed in *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), however, jury instruction error is not inherently prejudicial. *Rose*, 478 U.S. at 579-82; *Fulminante*, 111 S. Ct. at 1263. Rather, a reviewing court must ask whether the evidence was dispositive enough for the court to declare, beyond a reasonable doubt, that the jury would have reached the same result with correct instructions. *See Rose*, 478 U.S. at 583-84; *Pope v. Illinois*, 481 U.S. 497, 502 (1987) (court must determine whether "it can be said beyond a reasonable doubt that the jury's verdict . . . was not affected by the erroneous instruction"). Because jury instructions cannot be inherently prejudicial under this Court's precedent, the Court should issue a writ of certiorari to reverse this holding of the lower court.

The Seventh Circuit indeed examined the record in its harmless error analysis as this Court's precedent requires, but its method virtually assures that courts will always find prejudicial error in *Reddick* cases. The court stated that the trial judge, "by granting Taylor's request to tender manslaughter instructions, apparently believed that

there was enough evidence in the record to support mitigation to manslaughter." 954 F.2d at 454 (App. 24). This statement egregiously misstates Illinois law.

At Taylor's trial, the judge had to tender the voluntary manslaughter instruction if even "very slight evidence" supported the charge. *People v. Williams*, 205 Ill. App. 3d 751, 765, 563 N.E.2d 762, 770 (1st Dist. 1989); *People v. Arnold*, 139 Ill. App. 3d 429, 434, 487 N.E.2d 997, 1000 (1st Dist. 1985); *People v. Garcia*, 169 Ill. App. 3d 618, 620, 523 N.E.2d 992, 994 (1st Dist.), *appeal denied*, 122 Ill. 2d 584, 530 N.E.2d 255 (1988). By the decision below, whenever only "very slight evidence" supports voluntary manslaughter, a *Reddick* error is not harmless beyond a reasonable doubt. But the existence of "very slight evidence" plainly does not preclude a jury from finding that the defendant committed murder rather than manslaughter. The Seventh Circuit's declared method of harmless error analysis for *Reddick* errors, therefore, presumes prejudice; it does not even address the only relevant question, *i.e.*, whether "it can be said beyond a reasonable doubt that the jury's verdict . . . was not affected by the erroneous instruction." *Pope*, 481 U.S. at 502.

The harmless error doctrine "preserve[s] the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' " *Fulminante*, 111 S. Ct. at 1264 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). The decision below thwarts this policy by summarily dismissing the very real chance that a jury would have found a defendant guilty of murder even though the law technically required a manslaughter instruction. The court should grant certiorari to reverse the Seventh Circuit's decision.

CONCLUSION

The Seventh Circuit's decision contravenes this Court's precedent, creates a circuit split on a fundamental rule of criminal procedure, and wrongly gives a colorable habeas corpus claim to potentially hundreds of convicted murderers. Moreover, it fundamentally misapplies the harmless error standard required by numerous decisions of this Court. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois

TERENCE M. MADSEN
Assistant Attorney General

MARK E. WILSON
Assistant Attorney General

STEVEN J. ZICK
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2139

Counsel for Petitioner

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-1148

KEVIN TAYLOR,

Petitioner-Appellant,

v.

JERRY D. GILMORE,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 90-C-1211—**Michael M. Mihm**, *Judge.*

ARGUED SEPTEMBER 13, 1991—DECIDED JANUARY 21, 1992

Before POSNER, FLAUM, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* Kevin Taylor admitted that he stabbed his ex-wife's live-in lover to death, but maintained that his crime was manslaughter. An Illinois jury disagreed—maybe—and declared him a murderer. In this petition for a writ of habeas corpus, Taylor argues that his conviction was invalid because the instructions given the jury were defective, precluding it from returning a voluntary manslaughter verdict when one may have been appropriate.

Taylor's appraisal of the jury instructions in his case is well taken. The Illinois Supreme Court held in *People v. Reddick*, 526 N.E.2d 141 (Ill. 1988), that nearly identical instructions offended Illinois statutory law, and this

Court found in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), that they ran afoul of the federal due process clause. Illinois prudently concedes that the instructions given Taylor's jury were defective, and challenges the vitality of neither *Reddick* nor *Falconer*. It contends, however, that the retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989), deprive Taylor of the benefit of *Falconer* and *Reddick* because both cases announced "new rules" after his conviction became final and neither case falls within either of the two exceptions carved in *Teague*. The district court agreed and denied his petition for habeas corpus. 770 F. Supp. 445 (C.D. Ill. 1990). Because we find that *Falconer* is not a "new rule," and therefore that Taylor is entitled to its retroactive application, we reverse and grant the writ.

I.

A.

Prior to the killing a tense relationship had developed between Taylor and Scott Siniscalchi, the new romantic interest and housemate of his ex-wife Joyce. Katie Taylor, the young daughter of Joyce and Kevin, lived with Joyce and Siniscalchi, and the two men argued on occasion when Siniscalchi would bring Katie to Taylor's trailer home for parental visits. Taylor also claimed that Siniscalchi ridiculed and antagonized him when both men were working at a fair.

The bad blood reached a boiling point on September 14, 1985. At approximately 1 a.m., Taylor called Joyce—not an uncommon occurrence, as she often worked late hours—to arrange for visitation plans with Katie the following morning. The two spoke for a few moments, agreed that Taylor would pick Katie up at Joyce's home, and hung up. Taylor then realized that he had other plans that morning, and called Joyce back to make alternate arrangements. Siniscalchi answered the phone and refused to let Taylor speak with Joyce; he claimed that she was tired and needed sleep. Taylor then asked Siniscalchi if he would bring Katie to meet Taylor at the municipal pool that morning.

Siniscalchi refused, and (according to Taylor) said that he wasn't going to bring Katie anywhere to see Taylor. Finally, Taylor offered to pick Katie up at that moment, to which Siniscalchi replied (again, according to Taylor), "Well, suit yourself, but you're not going to get her." XIII Tr. at 70.

Agitated that Siniscalchi was trying to keep him from his daughter, Taylor quickly drove to Joyce's apartment building. Before leaving his car, Taylor grabbed a sheathed hunting knife and stuck it in the side of his sweatpants. Taylor testified that he heard Katie crying when he approached the door of Joyce's apartment. He beat on the door, and when nobody answered he kicked it open. Taylor then searched for Katie and found her sitting on the floor in the master bedroom, where Joyce and Siniscalchi were sitting up in bed. Taylor testified that, when he reached to pick up Katie, Siniscalchi "started to roll out of bed and looked like he was reaching for something." *Id.* at 76. A fracas ensued between the three adults, and Taylor was thrown into a wall. While Siniscalchi was pulling his hair and shirt, Taylor grabbed the knife and stabbed Siniscalchi, who screamed, "[t]he knife is in me Joyce, the knife is in me." XII Tr. at 42. Siniscalchi died from his wounds, and Taylor was subsequently arrested.

B.

At the time of Taylor's trial, Illinois homicide law provided that murder had two elements. First, the defendant must have performed the acts that caused the death of the victim; second, in performing those acts, the defendant must have intended to kill or do great bodily harm to the victim, must have known that the acts would cause great bodily harm or death, must have known that the acts created a strong probability of death or great bodily harm, or must have been committing a forcible felony (in Taylor's case, home invasion). Ill. Rev. Stat., ch. 38, ¶ 9-1 (1985). Voluntary manslaughter had three elements. The first two were, for all relevant purposes, the same as both

elements of murder. The third was a mitigating mental state; the defendant must have acted either under a sudden and intense passion arising from a serious provocation, or under an unreasonable (but honest) belief that deadly force was justified to prevent his imminent death or great bodily harm. *Id.* ¶ 9-2. In essence, the third element worked as a partial affirmative defense to a charge of murder—partial in that a successful defense effected a murder acquittal but a manslaughter conviction.[1]

At trial Taylor did not deny that he committed the homicide (although he was less forthright with the police following his arrest). He instead maintained that he acted under a sudden and intense passion provoked by Siniscalchi and hence was guilty only of voluntary manslaughter. At the close of the evidence, the judge tendered to the jury the Illinois pattern murder instructions followed by the pattern voluntary manslaughter instructions. The manslaughter instructions placed upon Taylor the burden of proving that he possessed a mitigating mental state. In addition, the instructions did not direct the jury to consider Taylor's manslaughter defenses in the event it found both elements of murder. The jury returned a murder verdict, and the judge sentenced him to 35 years of imprisonment. (Taylor's conviction and concurrent 6-year sentence for home invasion is not at issue here.)

On direct appeal, Taylor challenged his conviction on the ground, among others, that the jury instructions improperly assigned him the burden of proof on the mitigation issue. The trial judge, he argued, should have required the prosecution to *disprove* beyond a reasonable doubt his "sudden and intense passion" defense. The Illinois appel-

[1] Pursuant to amendments to the Illinois Criminal Code effective July 1, 1987, the crime of "murder" is now "first degree murder," and "voluntary manslaughter" is now "second degree murder." *See* Ill. Ann. Stat. ch. 38, ¶¶ 9-1, 9-2 (Smith-Hurd 1991); *Fleming v. Huch*, 924 F.2d 679, 680 n.1 (7th Cir. 1991); *People v. Brown*, 578 N.E.2d 1168, 1172 (Ill. App. 1st Dist. 1991).

late court did not reach the merits of this claim, holding that Taylor had waived it by not raising it at trial. *People v. Taylor*, No. 4-86-0355 (4th Dist. Feb. 2, 1987) (unpublished order). The Illinois Supreme Court denied his petition for leave to appeal on June 4, 1987. Since Taylor did not file a petition for writ of certiorari with the United States Supreme Court, his conviction became final on that date.[2]

Taylor then sought post-conviction relief in the Illinois courts. The trial court dismissed his petition. Subsequently, the Illinois Supreme Court in *Reddick*, 526 N.E.2d at 145-46, invalidated jury instructions similar for all relevant purposes to those given at Taylor's trial; the Court held (endorsing the argument Taylor made on direct appeal) that, under Illinois law, the state bears the burden of disproving beyond a reasonable doubt issues that would mitigate a homicide from murder to voluntary manslaughter. With *Reddick* in hand, Taylor appealed the trial court's denial of post-conviction relief. The Illinois appellate court nonetheless affirmed, explaining that *Reddick* did not correct "constitutional error," the only grounds available to support state post-conviction relief when a defendant had waived a claim at trial. *People v. Taylor*, No. 4-88-0075 (4th Dist. Mar. 31, 1989) (unpublished order). The Illinois Supreme Court again denied his petition for leave to appeal.

His state remedies exhausted, Taylor filed a petition for a writ of habeas corpus in federal district court under 28 U.S.C. § 2254. Eleven days later, we held in *Falconer v.*

[2] Or, perhaps, 90 days later. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989), held that a defendant's conviction becomes final on the date the United States Supreme Court denies his petition for certiorari on direct review. For defendants, like Taylor, who do not seek certiorari in the Supreme Court, it is unclear whether finality occurs on the date the state Supreme Court rules (or denies review), or 90 days later when the period for seeking certiorari expires. In any event, the issue is moot here since both *Reddick* and *Falconer* were decided more than 90 days after June 4, 1987.

Lane, supra, that the jury instructions invalidated on state law grounds in *Reddick* also transgressed the federal due process clause. The district court in this case agreed that Taylor's jury instructions were invalid under both *Reddick* and *Falconer*. 770 F. Supp. at 446. However, it held that both cases, decided after Taylor's conviction became final, announced new rules that did not fall within either of the two exceptions carved by *Teague* and its progeny. *Id.* at 448. Since *Teague* deprives habeas petitioners of the retroactive benefit of new rules not falling within either exception, *see Saffle v. Parks*, 494 U.S. 484, 487-88 (1990), the court denied Taylor's petition. This appeal followed.

II.

The district court rested its decision upon an interpretation of law, not a determination of fact. Our review is therefore *de novo*. Because the process of distinguishing new rules from old under *Teague* is complicated and of somewhat novel application in this circuit,[3] we survey the terrain to structure our inquiry into whether *Reddick* and *Falconer* indeed announced new rules, or whether both simply applied established rules in a different factual context.

In *Teague*, the Supreme Court defined a "new rule" as one that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original). The Court refined its definition in subsequent cases, holding that a decision announces a new

[3] To our knowledge, the only case deciding whether a given decision announced a new rule is *Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990). There, we held that the portion of *Wainwright v. Greenfield*, 474 U.S. 284 (1986), forbidding the prosecution's use of a defendant's post-*Miranda* warning silence to rebut his insanity defense did not announce a new rule, but rather was compelled by *Doyle v. Ohio*, 426 U.S. 610 (1976).

rule if it is contrary to earlier "reasonable, good-faith interpretations of existing precedents" by lower federal courts or state courts. *Butler v. McKellar*, 494 U.S. 407, 414 (1990). "[T]he fact that a court says that its decision was within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether [it] is a 'new rule' under *Teague*." *Id.* A case applies an old rule only if its holding is "compelled" by precedent. *Sawyer v. Smith*, 110 S. Ct. 2822, 2828 (1990). In contrast, a case puts forth a new rule if its outcome was "susceptible to debate among reasonable minds," or unless a contrary result would have been "an illogical or even a grudging application" of prior precedent. *Butler*, 494 U.S. at 415; *see also Sawyer*, 110 S. Ct. at 2828-31.

With these basic guidelines in mind, we can easily classify as a new rule any decision that explicitly overrules a prior case, *see Butler*, 494 U.S. at 412; *Penry v. Lynaugh*, 492 U.S. 302, 353 (1989) (Scalia, J., concurring and dissenting), significantly departs from precedent, or decides a question previously reserved. *See Teague*, 489 U.S. at 301 & n.1. Conversely, a decision clearly does not announce a new rule if it merely applies precedent, almost directly on point, to a closely analogous set of facts.

But, as the Court has recognized on occasion, the "new rule" rule is easier to recite than apply in most cases. *See id.* at 301; *Penry*, 492 U.S. at 314. It is often difficult to determine whether a case extends prior precedent, or merely applies it in a somewhat different factual context. The lines are fuzzy; in drawing them we remain keenly aware that terms such as "fact," "law," "precedent," and "reasonable" are pliable, and hence susceptible to contrary interpretations. *Compare Penry*, 492 U.S. at 314-19 (habeas petitioner not seeking new rule) *with id.* at 352-53 (Scalia, J., dissenting). Suffice it to say that discerning the domain of a given rule and marking the precise point at which its younger sibling, rather than it, applies is more an art than a science.

We discern from *Teague* and its progeny two criteria that offer guidance in distinguishing "old" from "new" rules in murky cases. The first criterion, explicitly employed in *Butler*, is whether any lower federal court or state court reached a different conclusion as to the precise legal issue subsequently resolved by a given decision. In *Butler*, the habeas petitioner argued that *Arizona v. Roberson*, 486 U.S. 675 (1988), did not announce a new rule because it merely applied the dictates of *Edwards v. Arizona*, 451 U.S. 477 (1981), in a different factual context. The Court disagreed; the fact that there had been a post-*Edwards* circuit split on the issue subsequently resolved in *Roberson* indicated that it was not compelled by precedent, and hence that it announced a new rule. *Butler*, 494 U.S. at 415. Prior state court decisions may be considered in this head count, *see id.* (alluding to split in state courts over issue decided in *Roberson*), unless they are based solely on state law. *See Sawyer*, 110 S. Ct. at 2829-31; *Carringer v. Lewis*, 948 F.2d 588, 596-97 (9th Cir. 1991).[4]

The fact that a given case departs from prior lower court or state court decisions on the same issue is good evidence that the case was "susceptible to debate among reasonable minds." But it is not dispositive. If a prior lower court or state court decision is not only incorrect,

[4] In a similar vein, *Sawyer v. Smith*, *supra*—which held that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), was a new rule—hints that the presence of a written dissent in a case is evidence that the case announced a new rule. *Sawyer*, 110 S. Ct. at 2828 ("Certainly *Caldwell* was not seen as compelled by the three Justices . . . who found a 'lack of authority' in our Eighth Amendment precedents for the approach taken there.") (citation omitted). If the Court meant to make this relevant, *Sawyer* represents a break from *Penry*, which held, as a threshold matter, that the rule announced therein was not new despite the fact that four Justices dissented on the merits. *Penry*, 492 U.S. at 314-19. We need not resolve this dispute here since there were no written dissents in *Reddick*, *Falconer* or either of the decisions affirming *Falconer*. *See Fleming v. Huch*, *supra*; *Rose v. Lane*, 910 F.2d 400 (7th Cir. 1990).

but obviously so, it could hardly be said that the existence of that decision renders a subsequent corrective a new rule. Moreover, the absence of prior contrary decisions does not necessarily indicate that a later case was beyond dispute, and hence not a new rule.

The second criterion, amenable to less precise application than the first, concerns the generality of the precedent underlying the decision at issue. The more general a given set of precedent, the more latent ambiguity inherent in that precedent, and the less likely a subsequent decision is dictated by that precedent—and therefore the more likely it announces a new rule. Conversely, the more specific the given set of precedent, the less likely a decision announces a new rule—assuming, of course, that the precedent is specific in a manner that lends easy application to the decision at issue. As will become clear shortly, applying this criterion requires that one examine precedent, however specific, in light of the factual context in which it arose.

Sawyer presents a rather simple illustration of how levels of generality play into *Teague* new rule analysis. Petitioner there maintained that *Caldwell v. Mississippi*, 472 U.S. 320 (1985)—a case invalidating death sentences imposed by sentencing bodies led (incorrectly) to believe that the ultimate responsibility for sentencing lies elsewhere—was "dictated by the principle of reliability in capital sentencing" established in prior eighth amendment cases. *Sawyer*, 110 S. Ct. at 2828. The Court took exception to this reasoning, noting that *Teague* "would be meaningless if applied at [that] level of generality." *Id.* Simply stated, *Caldwell* was no more "compelled" by the precedent cited by petitioner than it was by the principle that the Eighth Amendment prohibits cruel and unusual punishment. Were it any other way, habeas petitioners could circumvent *Teague* by describing the precedent underlying the case whose benefit they seek at a high enough level of generality. More specificity is required.

Use of the generality criterion is implicit in other post-*Teague* cases. As noted above, *Butler* held that *Roberson*

followed, but was not dictated by, *Edwards*, and consequently was a new rule. *Edwards* provides that the fifth amendment bars police from reinitiating interrogation of a suspect in custody once the suspect has requested counsel, and excludes from evidence any confessions elicited during the second (post-request) interrogation. The second interrogation in *Edwards* focused upon the same crime as the first. *Roberson*, decided seven years later, held that the *Edwards* rule applies when the second interrogation focuses upon a different crime than the first. The Court's opinion in *Butler* suggests that *Roberson* was a new rule because (among other reasons) the dictate of *Edwards*—"police shall refrain from all further interrogation after a defendant asks for counsel"—was too general. Owing to the particular factual situation underlying *Edwards*, it was unclear whether a custodial defendant's request for counsel precludes subsequent questioning *only* on the subject of the original interrogation or on *all* subjects. To have "compelled" *Roberson* within the meaning of *Teague*, *Edwards* would have had to be more specific (e.g., "police shall refrain from all further interrogation after a defendant asks for counsel, whether or not the second interrogation involves the same crime than the first"). Or the separate interrogations in *Edwards* would have had to have focused upon different crimes. (Either possibility would have rendered *Roberson* superfluous.) In short, *Butler* deemed *Roberson* "new" because the general rule in *Edwards* had a latent ambiguity; it did not *specifically* forbid subsequent interrogation on matters unrelated to the first interrogation, and thus possibly was limited to resumption of the original line of questioning.

By way of contrast, consider the following hypothetical. Instead of *Edwards* and *Roberson* the Supreme Court decided two similar cases, *Jones* and *Smith*. *Jones* announced the same rule as *Edwards*, but arose in a case where the first interrogation involved a murder and the second, conducted after the defendant requested counsel, a vehicular homicide. *Smith* reaffirmed the *Jones* rule in a situation where the first interrogation focused on a murder and the

second on mail fraud. A habeas petitioner, whose conviction became final after *Jones* but prior to *Smith*, seeks the benefit of the two cases where his two crimes, also subject to sequential rounds of questioning interrupted with a request for counsel, were identical to those in *Smith*. The question arises whether *Smith* announced a new rule. If it did, the petitioner is denied relief; if it did not, he gets the benefit of *Smith* (and, it follows, *Jones*, for if *Smith* is not new, *Jones* applies with equal force).

The state, were it to make the case that *Smith* announced a new rule, would argue as follows. The rule in *Jones*—"police shall refrain from all further interrogation after a defendant asks for counsel"—is too general in light of the factual context in which it arose. *Jones*, in other words, contains a latent ambiguity because it is unclear whether its provisions apply only to cases where both interrogations involved homicides, or perhaps crimes of a similar type (e.g., two different burglaries). *Jones*, then, did not compel *Smith* because the second interrogation there involved a mail fraud scheme, a different type of crime than murder, the subject of the first interrogation.

This argument, however, cuts too finely. The purpose of *Jones* is to prevent reinterrogation once a defendant requests counsel, and the facts of the case clearly indicate that the rule applies regardless of whether the separate interrogations involve separate crimes. That the separate crimes were both homicides, or of the same general type, is of almost no relevance to the gist of *Jones*. (In contrast, one could plausibly—though, ultimately, incorrectly—maintain that the purpose of *Edwards*, in light of its facts, was to prevent renewal of interrogation on the same crime; when the defendant asserted his *Miranda* rights with respect to crime #1, he may have been unaware that he was under investigation for crime #2, or perhaps more willing to talk about his involvement in crime #2.) The supposed latent ambiguity in *Jones* is a fiction, because no reasonable jurist would distinguish *Smith* from *Jones* on the specious grounds advanced (hypothetically) by the

state. It follows that the *Jones* rule, even in light of its particular facts, is specific enough to compel *Smith*, and hence that *Smith* is not a new rule.

To sum up, we adopt the following analysis when deciding whether a case announces a new rule under *Teague*. First, we determine whether the case clearly falls in one category or another—if it overrules or significantly departs from precedent, or decides a question previously reserved, it is a new rule, while if it applies a prior decision almost directly on point to a closely analogous set of facts, it is not. Second, when the question is a close one, we will look to (1) whether the case at issue departs from previous rulings by lower courts or state courts, and (2) the level of generality of prior precedent in light of the factual context in which that precedent arose.

III.

The Illinois Supreme Court in *Reddick* invalidated jury instructions identical in all relevant respects to those tendered at Taylor's trial. The central issue in *Reddick* was whether, in a homicide case, the defendant or the prosecution bears the burden of proving whether the defendant had a mitigating mental state when the killing occurred. The Court found that this issue was controlled by § 3-2 of the Illinois Criminal Code of 1961 (Ill. Rev. Stat., ch. 38, ¶ 3-2 (1985)). *Reddick*, 526 N.E.2d at 145. Under this provision,

> if a defendant in a murder trial presents sufficient evidence to raise issues which would reduce the charge of murder to voluntary manslaughter, then to sustain the murder conviction, the People must prove beyond a reasonable doubt that those defenses are meritless . . . .

Id. at 146. The Court declared the jury instructions defective because they placed upon the defendant the burden of proving the existence of a mitigating mental state. *Id.*

Both parties here agree that the instructions given at Taylor's trial contravene *Reddick* and that *Reddick* was

handed down after Taylor's conviction became final. They disagree as to whether we should accord Taylor the retroactive benefit of *Reddick*. Both parties assume that *Teague* governs here; Taylor maintains that *Reddick* did not announce a new rule, while the state maintains that it did. Their assumption, however, is incorrect. It is irrelevant whether the rule in *Reddick* is new or old, for it was grounded solely on Illinois criminal law, and we are foreclosed from granting habeas relief because a state court committed an error of state law. *See Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991); *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

By stating our holding in such categorical terms we do not mean to imply that the precise nature of *Reddick* (that it is based solely on state law) was always free from doubt, or even that we had no hand in creating this doubt. In *Rose v. Lane*, 910 F.2d 400, 401 n.1 (7th Cir. 1990), for example, we suggested that *Reddick* "creates a federal claim through *In re Winship*." While we subsequently characterized this statement as "somewhat unartful shorthand," *Fleming v. Huch*, 924 F.2d 679, 683 (7th Cir. 1991), some of our cases may have left the lingering impression that we still believed there was some federal constitutional content in *Reddick*. *See Falconer*, 905 F.2d at 1134 (stating that *Reddick* "obviously considered the errors resulting from the invalid instructions to be of constitutional magnitude"); *id.* (suggesting link between *Reddick* and *Mullaney v. Wilbur*, 421 U.S. 684 (1975)); *Rose*, 910 F.2d at 402 ("We held [in *Falconer*], following *Reddick*, that the instructions were gravely erroneous and denied the defendant due process of law."); *Fleming*, 924 F.2d at 683 (referring to petitioner's argument as a "*Falconer/Reddick* claim").

We take this opportunity to dispel any such impressions. *Reddick*, according to its own terms, was controlled by § 3-2 of the Illinois Criminal Code. The question here is whether the case was *also* controlled by the federal constitution; *Reddick* left this question unaddressed because of its grounding in state law. We find that it was not.

First, any links with the due process principles in *Falconer* are illusory. *Falconer*, as we shall see, did not rest on burden of proof questions, but rather upon the fact that the instructions were confusing and could permit a jury to completely ignore whether the defendant had a mitigating mental state—regardless of who bore the burden of proof. *Falconer*, 905 F.2d at 1136. It is thus inapposite to *Reddick*.

Nor was *Reddick* based upon due process rule underlying *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *Mullaney* held that the prosecution, to garner a murder conviction, bears the burden of disproving (beyond a reasonable doubt) that the defendant possessed a mitigating mental state when he committed the homicide. It would have controlled the result in *Reddick* but for *Patterson v. New York*, 432 U.S. 197, 212-16 (1977), which limited *Mullaney* to cases where the state includes "malice" as an element of murder. In other words, only if "malice" is an element of murder does the federal due process clause require the prosecution to prove that the defendant did not act under a mitigating mental state. While this distinction seems formalistic—it may permit states to shift the burden of proof on a rather crucial issue only if it omits the term "malice aforethought" from its murder statute—it is, as both Taylor and Illinois concede, the law. *See* App. Br. at 14-16; Resp. Br. at 6.

The question, then, is whether malice was an element of murder in Illinois at the time of Taylor's conviction. It was at one point, but Illinois deleted the phrase "malice aforethought" from its murder statute when it revised the Criminal Code in 1961. Taylor, pointing to several Illinois appellate court decisions, makes a spirited argument that, the amendment notwithstanding, malice remains an element of murder. His argument, however, is doomed by the Illinois Supreme Court's subsequent decision in *People v. Wright*, 488 N.E.2d 973, 978 (Ill. 1986) (malice no longer an element of murder), which we must accept as the definitive interpretation of Illinois law. *See Hebert v. Louisiana*, 272 U.S. 312, 316 (1926).

Reddick, therefore, does not rest upon federal due process principles, but rather is controlled solely by the Illinois Criminal Code (which, as it certainly may, gives criminal defendants tried in Illinois courts more breaks than it is required to by the federal due process clause). Any indications to the contrary in our prior decisions are disavowed. Taylor consequently cannot reap the benefit of *Reddick* on collateral review, for we may not grant habeas relief to remedy an error of state law. *See McGuire*, 112 S. Ct. at 480; *Pulley*, 465 U.S. at 41; *Fagan v. Washington*, 942 F.2d 1155, 1158 (7th Cir. 1991); *Cole v. Young*, 817 F.2d 412, 416 (7th Cir. 1987).

In fact, this case is markedly similar to *Engle v. Issac*, 456 U.S. 107 (1982). In 1974, the Ohio legislature enacted a statute governing the use of affirmative defenses at criminal trials. Most Ohio lower courts, including the court that convicted the habeas petitioner, had interpreted this statute to require criminal defendants to prove self-defense by a preponderance of the evidence. Subsequently, the Ohio Supreme Court in *State v. Robinson*, 351 N.E.2d 88 (Ohio 1976), construed the statute to place only the burden of production upon the defendant; once this burden was satisfied, the state was obligated to disprove self-defense beyond a reasonable doubt. *Engle* found that *Robinson* was not based upon the federal constitution; while *In re Winship*, 397 U.S. 358 (1970), and its progeny require that the state prove all elements of a crime beyond a reasonable doubt, Ohio did not make, nor did the constitution require it to make, the absence of self-defense an element of homicide. *Robinson* was thus based solely upon Ohio law, which (like the Illinois Criminal Code) granted criminal defendants greater protection than that afforded by the federal due process clause. The habeas petitioner's only claim, then, was that the jury instructions at his trial did not comply with state law. This, *Engle* held, is not a federal constitutional claim, and hence not a ground for granting habeas relief. *Engle*, 456 U.S. at 120-21 & n.21.

For the foregoing reasons, the question of whether *Reddick* constitutes a "new rule" under *Teague* is irrelevant,

for we can give the case neither retroactive nor prospective application on collateral review. One problem remains—the state arguably waived this argument by not pushing it either in the district court or on appeal. While we generally disregard waived issues, there are a narrow class of exceptions, primarily those involving "delicate issues of comity." *Thomas v. Indiana*, 910 F.2d 1413, 1415 (7th Cir. 1990). The rule of *Pulley* and *Engle*—which forbids federal courts in collateral proceedings from forcing state courts to remedy violations of state criminal law—certainly falls within this class, and hence we apply it despite the state's waiver.

IV.

Falconer was a habeas case in which we considered the same Illinois murder and manslaughter pattern jury instructions invalidated in *Reddick*. The two sets of instructions, we observed, were fine when read separately. *Falconer*, 905 F.2d at 1135. When read together, however, they were susceptible to more than one reasonable interpretation. One such interpretation could have left the jury "with the false impression that it could convict the petitioner of murder even if she possessed one of the mitigating states of mind described in the voluntary manslaughter instruction." *Id.* at 1136. We reasoned as follows. First, the murder instructions properly laid out the elements of murder, but did not explain that the jury could not return a murder verdict if it found that the defendant had one of the two mental states that would mitigate the homicide to manslaughter. *See id.* Second, the murder instructions preceded the voluntary manslaughter instructions. Consequently, the instructions could have allowed the jury to find that the prosecution proved both elements of murder, and to conclude that a murder verdict was appropriate, without ever reaching the issue of whether the defendant possessed a mitigating mental state. (This problem would not have arisen had the voluntary manslaughter instructions preceded the murder instructions, or had the murder instructions directed the jury to consider the

manslaughter defenses once it found both elements of murder.) We held that this violated the petitioner's due process rights and reversed his murder conviction. This Court reaffirmed *Falconer* in *Fleming v. Huch*, *supra*, and *Rose v. Lane*, *supra*.

The parties agree that the instructions given at Taylor's trial were invalid under *Falconer*. We therefore consider only whether *Falconer* announced a new rule, and, if not, whether the defective instructions were harmless beyond a reasonable doubt.[5]

A.

The state contends that *Falconer* departed from our "previously expressed views of the Illinois murder and voluntary manslaughter statutes." Resp. Br. at 10. If this is true, *Falconer* is definitely a new rule. *See* p. 7 *ante*; *Teague*, 489 U.S. at 301.

The state's strongest argument in this regard is that *Falconer* broke from *Peery v. Sielaff*, 615 F.2d 402 (7th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980), and *Bacon v. De Robertis*, 728 F.2d 874 (7th Cir.), *cert. denied*, 469 U.S. 840 (1984). Both cases (according to the state) hold that a court's refusal to tender voluntary manslaughter instructions at a homicide trial does not violate due process. If this were all *Peery* and *Bacon* held, *Falconer* would indeed be new—if we had previously held that a *complete* denial of voluntary manslaughter instructions comports with due process, a subsequent decision holding that a *constructive* denial violates due process certainly breaks from precedent. But *Peery* and *Bacon* said more:

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[5] At the outset, we note that Taylor's attorney failed to challenge the jury instructions at trial. Consequently, Taylor arguably waived the issue under *Wainwright v. Sykes*, 433 U.S. 72 (1977). The state, however, did not push this point in the district court and does not advance it here. It has therefore "waived waiver," *Fagan*, 942 F.2d at 1157, although it is not clear whether a waiver claim would ultimately have succeeded.

a court's refusal to tender a manslaughter instruction does not violate due process *unless* the refusal would result in a "fundamental miscarriage of justice." *Bacon*, 728 F.2d at 875; *Perry*, 615 F.2d at 404. A miscarriage occurs "if *credible* evidence in the record would support a verdict based on [the omitted] instruction." *Bacon*, 728 F.2d at 875; *see also Nichols v. Gagnon*, 710 F.2d 1267, 1269 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984). Since there was no evidence that the defendants possessed a mitigating mental state in either *Peery* or *Bacon*, the courts' refusal to tender voluntary manslaughter instructions satisfied due process. In contrast, the defendant in *Falconer* presented such evidence, leading the trial judge there to tender a voluntary manslaughter instruction, albeit defective, to the jury. The facts of *Falconer*, then, took the case beyond the reach of *Perry* and *Bacon*. Consequently, it cannot be said to represent a break from those two cases.

Falconer is not the type of case that departed from precedent and hence obviously announced a new rule. Further, since there was no precedent directly on point at the time *Falconer* was decided, nor was it clearly an application of an old rule. We therefore apply the two-part analysis laid out above for difficult "new rule" cases.

B.

1.

Our first inquiry is whether lower courts or state courts had previously disagreed with the ruling we subsequently handed down in *Falconer*. The state points to *Fleming v. Gramley*, 735 F. Supp. 302 (C.D. Ill. 1990) ("*Fleming I*"), *rev'd sub nom., Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991) ("*Fleming II*"), as evidence of such a split. *Fleming I* denied habeas relief sought by a petitioner who was convicted of murder by a jury given the murder and manslaughter instructions subsequently invalidated in *Falconer*. In doing so, however, the court did not reject the due process rule underlying *Falconer*. Rather, it denied

relief on the ground that the petitioner was not entitled to a mitigation instruction because she presented insufficient evidence to support a voluntary manslaughter verdict. *Fleming I*, 735 F. Supp. at 307-08. *Fleming I* therefore implemented, albeit without citation, our decisions in *Perry* and *Bacon*, which held that due process requires the trial judge to tender manslaughter instructions (in a murder trial) only if the record contains such evidence. If, the court seemed to suggest, the petitioner was not entitled to manslaughter instructions in the first instance, she cannot complain that the instructions ultimately tendered were defective.

Fleming I never reached, even tangentially, the central issue decided in *Falconer*—what due process requires in the event a defendant presents credible evidence that *could have* supported a manslaughter verdict. (The petitioner in *Falconer* had cleared this threshold.) Seen in this light, *Fleming I* is distinguishable from *Falconer* on factual, not legal, grounds. *See id.* at 307-08. It therefore does not represent the type of frontal assault on *Falconer* which suggests prior disagreement with the precise legal issue decided therein. *See Thomas*, 910 F.2d at 1415-16.

The state also calls our attention to *People v. McGee*, 110 Ill. App. 3d 766, 443 N.E.2d 1057 (2d Dist. 1982), and *People v. Howard*, 139 Ill. App. 3d 755, 487 N.E.2d 656 (2d Dist. 1985), two cases that affirmed murder convictions returned by juries given the same instructions later invalidated in *Reddick* and *Falconer*.[6] These cases, however, were based solely on state law, *see McGee*, 443 N.E.2d at 1063-64; *Howard*, 487 N.E.2d at 660-61, and hence are not evidence of a pre-*Falconer* difference of opinion. *See* p. 8 *ante*; *Sawyer*, 110 S. Ct. at 2829-31.

We therefore find no indication that lower courts or state courts had previously split on the issue ultimately decided in *Falconer*.

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[6] While the state cites these cases to demonstrate that *Reddick* was a new rule, it is possible that they are also relevant to the novelty of *Falconer*.

2.

Our second inquiry concerns the generality of the case law underlying *Falconer*. *Falconer* considered itself an application of *Cupp v. Naughten*, 414 U.S. 141, 146 (1973), which provides that a federal court may overturn a state conviction if the "ailing" jury instructions tendered by the trial judge "so infected the entire trial that the resulting conviction violates due process." The state, however, argues that even if *Falconer* applied *Cupp*, nothing about *Cupp* dictated the result in *Falconer*. It is correct. Unlike *Falconer*, *Cupp* did not speak to circumstances where the challenged instructions were susceptible to more than one reasonable interpretation. Moreover, *Cupp* did not specify what types of infirmities would violate due process. *Cupp* is therefore too general to have compelled *Falconer* within the meaning of *Teague*. We also find, without further discussion, that the other cases cited for support in *Falconer*—including *Clark v. Jago*, 676 F.2d 1099 (6th Cir. 1982), *cert. denied*, 466 U.S. 977 (1984), and *Reed v. Lane*, 759 F.2d 618 (7th Cir. 1985), *cert. denied*, 475 U.S. 1054 (1986)—are either too general or too tangential to have dictated its result.

But this does not end our inquiry. In determining whether a given decision is compelled by precedent, we examine not only the precedent the decision actually cites, but also the precedent it could have cited. Self-characterization has never been considered dispositive in *Teague* new rule analysis. The simple fact that a decision, for whatever reason, fails to cite the authorities that compel it does not render it a new rule, any more than the fact that a decision describes itself as "controlled" by the authorities it cites renders it an application of an old rule. *See Butler*, 494 U.S. at 415. If a case is compelled by existing precedent, it is compelled whether it cites that precedent or not (leaving aside whether it was drafted in the most effective manner possible).

Falconer, recall, reversed petitioner's murder conviction because the jury could have interpreted the jury instructions as permitting it to return a murder verdict without first considering the defendant's manslaughter defenses. Our holding actually rested upon two premises: first, that the instructions were inherently ambiguous and susceptible to more than one interpretation; and, second, that a murder verdict reached (in accordance with one of these interpretations) without considering a defendant's manslaughter defenses violates due process. An examination of all relevant case law, particularly *Cupp*'s progeny, convinces us that there was precedent specific enough to have compelled each of these premises at the time *Falconer* was decided.

We first consider *Falconer*'s ruling that the challenged jury instructions were ambiguous and susceptible to an erroneous (we assume for the moment it was erroneous) interpretation. Prevailing law at the time *Falconer* was decided provided that, in cases challenging the sufficiency of ambiguous jury instructions, a court must view the instructions "as a whole," *Cupp*, 414 U.S. at 146-47, and ask "whether there is a reasonable likelihood that the jury has applied the challenged instruction in" an invalid manner. *Boyde v. California*, 494 U.S. 370, 380 (1990). Was *Falconer*'s implied finding—that there was a "reasonable likelihood" that the jury applied the Illinois murder and manslaughter instructions in an erroneous manner—a new rule because no other court had addressed the question? We think not, principally because the *Boyde* rule was stated at a low enough level of generality to render *Falconer* an application of *Boyde* to a different set of facts. The rule has no latent ambiguity; there is no suggestion that it applies to some jury instructions but not to others. *Boyde* simply directs a reviewing court to assess whether, in its opinion, there is a reasonable likelihood that a certain event occurred. This is a quintessentially factual determination. To assert that *Falconer* was new, because it was the first case to assert that a particular set of instructions was ambiguous and susceptible to different interpretations, would obliterate the distinction between rules and their applications, and thereby contravene the principles of *Teague*.

Second, we consider *Falconer*'s holding that instructions permitting a jury to reach a murder verdict without considering evidence that would warrant mitigation to voluntary manslaughter (in accordance with a reasonable interpretation of those instructions) violates due process. *Connecticut v. Johnson*, 460 U.S. 73 (1983), considered jury instructions that created an erroneous presumption on the element of intent. The instructions were previously invalidated in *Sandstrom v. Montana*, 442 U.S. 510 (1979), but *Johnson* elaborated on *Sandstrom*; the Court explained that the instructions were forbidden because they led the jury to ignore exculpatory evidence in finding the defendant guilty of murder beyond a reasonable doubt. *Johnson*, 460 U.S. at 84-85 (plurality opinion). We believe that this due process principle[7] is specific enough to have dictated the result in *Falconer*. Evidence of a mitigating state of mind in a homicide prosecution, while leaving a defendant guilty of manslaughter, would still exonerate as to murder. If we accept that a reasonable interpretation of the instructions in *Falconer* would have lead [sic] the jury to ignore evidence of this type, the instructions clearly contravene the principle advanced in *Johnson*.

Granted, one could conceivably argue that *Johnson* does not address the specific issue under consideration in *Falconer*, and hence does not dictate its result. *Johnson* involved instructions that lead the jury to ignore exculpatory evidence as to intent, an *element of the crime* (attempted murder) of which petitioner there was convicted.

[7] *Johnson* was a plurality opinion, but the dissent did not take issue with this particular portion of the opinion. Rather, the dissent disputed the plurality's suggestion that instructions violating *Sandstrom* warrant nearly automatic reversal, and argued instead that such errors should be subject to *Chapman* harmless error analysis. *Id.* at 94-102 (Powell, J., dissenting). The dissent's view ultimately prevailed in *Rose v. Clark*, 478 U.S. 570 (1986), and we accordingly apply harmless error analysis to the instructional error in this case.

Falconer, in contrast, involved instructions that lead the jury to ignore evidence regarding a mitigating mental state, the absence of which (in Illinois) is not an element of murder, but rather the presence of which is an *affirmative defense*. This argument, however, carves an insignificant distinction. What ultimately mattered in *Johnson* was that the jury could not weigh evidence that may have led to an acquittal on the charge of conviction—regardless of whether the evidence related to an element of the crime or an affirmative defense. In a state that defines manslaughter and murder as separate crimes, and at a trial where a defendant is constitutionally entitled to voluntary manslaughter instructions, a homicide committed under a sudden and intense passion is no more a murder than a homicide committed without the intent to kill. In this light, the principle laid out in *Johnson* is indistinguishable from that applied in *Falconer*.

In accordance with the two-pronged analysis established herein, we find that *Falconer* is not a new rule, and hence that Taylor is entitled to its retroactive application.

C.

We now consider whether the erroneous jury instructions at Taylor's trial were harmless beyond a reasonable doubt. *See Rose v. Clark*, 478 U.S. 570 (1986); *Chapman v. California*, 386 U.S. 18 (1967).

The state contends that the jury, had it been constitutionally instructed, would have still (beyond a reasonable doubt) returned a murder verdict, and therefore that the error was harmless under *Chapman*. We have rejected similar contentions in the past, finding that the constitutional errors in the Illinois murder/manslaughter pattern instructions were "inherently prejudicial." *Fleming*, 924 F.2d at 683; *Rose*, 910 F.2d at 403; *Falconer*, 905 F.2d at 1137. This is particularly true in Taylor's case. Taylor admitted at trial to killing Siniscalchi; his entire defense rested upon his contention that he had acted under a sudden and intense passion and was consequently entitled to

a manslaughter verdict. *See* XIII Tr. at 126-40 (closing argument of defense counsel). The trial judge, by granting Taylor's request to tender manslaughter instructions, apparently believed that there was enough evidence in the record to support mitigation to manslaughter. *See id.* at 98-101 (colloquy on jury instructions). Had there been insufficient evidence in that regard, the judge would not have been obliged to grant Taylor's request. *See Peery*, 615 F.2d at 404. Our review of the record confirms the trial judge's belief—although there is certainly enough evidence to allow a reasonable jury to return a murder verdict as well. We therefore conclude that the error at Taylor's trial was not harmless.

* * *

We grant Taylor's petition for a writ of habeas corpus. The writ shall issue unless the State of Illinois elects to retry him within 120 days.

REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 21, 1992

BEFORE: Honorable Richard A. Posner, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

No. 91-1148

KEVIN W. TAYLOR,
Petitioner-Appellant,

v.

JERRY D. GILMORE, Warden,
Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division
No. 90 C 1211, Judge Michael M. Mihm

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, REVERSED; Taylor's petition for a writ of habeas corpus is granted and the writ shall issue unless the State of Illinois elects to retry him within 120 days, in accordance with the opinion of this Court filed this date.

APPENDIX B

[Filed December 19, 1990]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 90-1211

UNITED STATES EX REL. KEVIN TAYLOR,

Petitioner,

v.

JERRY D. GILMORE,

Respondent.

ORDER

Before the Court is Petitioner Kevin Taylor's Petition for Habeas Corpus Relief pursuant to 28 U.S.C. §2254. Taylor asserts that the jury instructions issued by the trial court violated his constitutional right to due process. For the reasons stated below, the Petition for Habeas Corpus relief is DENIED.

BACKGROUND

Following a jury trial in the Circuit Court of Sangamon County, Taylor was convicted of murder and home invasion and sentenced to concurrent terms of 35 years and six years respectively. The facts supporting these convictions are not critical to the issues discussed herein, so they are set forth here only briefly as general background information.

On September 14, 1986, at approximately 1:00 a.m., Taylor called the home of his ex-wife Joyce Taylor to ask about their daughter Katy and about Joyce's boyfriend, Scott Siniscalchi. Joyce spoke briefly with Taylor and then hung up. A few minutes later, Taylor called back and this time Joyce's boyfriend Scott answered the phone. During a brief conversation, Scott raised his voice and told Taylor to leave Joyce alone because she needed her sleep.

A short time later, Taylor broke into Joyce's home and walked into the bedroom where Joyce and Scott had been sleeping. Taylor climbed onto the bed and, as Joyce and Scott moved away, he pulled out a knife and jumped on top of Scott. The two men struggled and Taylor stabbed Scott with the knife and killed him.

The state charged Taylor with murder and the lesser included offense of voluntary manslaughter, as well as home invasion. Taylor's position at trial was that he acted under a sudden and intense passion at the time of the killing and thus that he could only be convicted of voluntary manslaughte..

At the close of the evidence, the jury was given pattern instructions on murder followed by the following pattern instructions on voluntary manslaughter:

> To sustain the charge of voluntary manslaughter, the evidence must prove the following propositions:
>
> First: That the Defendant performed the acts which caused the death of Scot [sic] Siniscalchi, and
>
> Second: That when the Defendant did so he intended to kill or do great bodily harm to Scot [sic] Siniscalchi; or he knew that such acts would cause death or great bodily harm to Scot [sic] Siniscalchi; or he knew that such acts created a strong probability of death or great bodily harm to Scot [sic] Siniscalchi;

Third: That when the Defendant did so he acted under a sudden and intense passion, resulting from serious provocation by another.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

As stated previously, the Defendant is charged with committing the offense of murder and voluntary manslaughter. If you find the Defendant guilty, you must find him guilty of either offense; but not both. On the other hand, if you find the Defendant not guilty, you can find him not guilty on either or both offenses.

After being given these instructions, the jury returned a verdict finding Taylor guilty of murder.

On direct appeal, the Illinois Appellate Court affirmed Taylor's conviction. The Illinois Supreme Court later denied Taylor's petition for leave to appeal this decision. Taylor was equally unsuccessful in his petition for post-conviction relief at all levels of the Illinois courts.

About a year after Taylor had exhausted his direct appeals, the Illinois Supreme Court handed down its decision in *People v. Reddick*, 123 Ill.2d 184, 526 N.E.2d 141, 122 Ill.Dec. 1 (1988), which held that jury instructions such as those used in Taylor's trial constitute "grave error." The court in *Reddick* found that with these instructions a jury could find a defendant guilty of murder even though it found the presence of mitigating factors in the evidence which would support a finding of voluntary manslaughter. After *Reddick* was decided, Taylor filed this petition for

habeas relief, arguing that the jury instructions used violated his constitutional right to due process.

DISCUSSION

The state concedes that, under the current state of the law, the jury instructions used in Taylor's trial amount to a due process violation. The state notes that the Seventh Circuit has adopted *Reddick*'s view that such jury instructions on murder and voluntary manslaughter, when read together as they were at Taylor's trial, erroneously permit a jury to convict a defendant of murder even where it finds the presence of one or more mitigating circumstances. *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990). *Falconer* held that the *Reddick* decision, although not explicitly stated in such terms, was clearly predicated upon constitutional considerations of due process.

Thus, the issue of the constitutionality of the jury instructions used in Taylor's trial is not an issue before this Court—the *Reddick/Falconer* analysis holds that they are constitutionally defective and the state does not dispute this. However, the state argues other reasons why Taylor is not entitled to habeas relief despite these decisions. First, the state argues that, pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), the *Reddick* decision should not be applied retroactively to Taylor's conviction. Secondly, the state argues that even if the *Reddick* decision is applied to Taylor's conviction, any error produced by the erroneous instructions was harmless.

Teague held that a newly forged constitutional principle which was not in effect at the time that a conviction became final may not provide the basis for habeas relief. *Teague* created a "general rule" that "new constitutional rules of criminal procedure will not be applicable to those

cases which have become final before the new rules are announced." 489 U.S. at 310. The state argues that *Reddick* announced a new constitutional rule not in effect when Taylor's conviction became final, and thus is not applicable to his conviction.

Taylor was convicted on March 20, 1986. Taylor proceeded on direct review of his conviction until May 9, 1987, when the Illinois Supreme Court denied leave to appeal. If Taylor's conviction did not become final on May 9, 1987 when the Illinois Supreme Court denied leave to appeal, then it certainly became final 90 days thereafter when Taylor's period for seeking a writ of certiorari expired. *See* United States Supreme Court Rule 13; *Penry v. Lynaugh*, 109 S.Ct. 2934, 2944 (1989).

The Illinois Supreme Court's decision in *Reddick*, on the other hand, was not handed down until June 20, 1988—almost a year after Taylor's direct review had expired. Thus, the only way the *Teague* general rule will not apply (and that *Reddick* will be given retroactive application) is if *Reddick* did not announce a "new constitutional rule of criminal procedure."

In defining what constitutes a "new rule," the Supreme Court in *Teague* stated as follows:

> In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government. (Citations omitted). To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. (Citation omitted) (emphasis in original).

The dispositive question then becomes whether *Reddick* announced such a new constitutional principle.

Taylor asserts that *Reddick* was based upon well-established principles of constitutional law and thus should be afforded retroactive application. Plaintiff cites *People v. Flowers*, 192 Ill.App.3d 292, 548 N.E.2d 766, 139 Ill.Dec. 381 (1st Dist. 1989) in support of this argument. In that case, the Illinois Appellate Court stated as follows:

> Moreover, the rule enunciated in *Reddick* was clearly predicated upon well-settled principles of law. Consequently, although defendant's conviction was final prior to the issuance of the *Reddick* decision, we conclude that the rule of *Reddick* should be applied [retroactively] to defendant's pending collateral attack on his conviction.

139 Ill.Dec. at 384. However, the Illinois Appellate Court cited no cases substantiating its position that *Reddick* was "clearly" based upon existing law.

The state argues that *Reddick* did announce a new principle of law and thus should not be afforded retroactive application. In support of its argument, the state cites *People v. Flowers*, 138 Ill.2d 218, 561 N.E.2d 674, 149 Ill. Dec. 304 (1990), the Illinois Supreme Court's review of the Illinois Appellate Court decision above. In *Flowers*, the Illinois Supreme Court reversed the Appellate Court and held that *Reddick* did indeed announce a new constitutional rule of criminal procedure.

> We conclude that *Reddick* did constitute a new rule. Though *Reddick* was doctrinally consistent with existing laws regarding affirmative defenses and burdens of proof, it was the first time this court applied these legal principles to the specific situation of the murder and voluntary manslaughter instructions. In applying these principles, not only did the court determine that the instructions were erroneous, it also ruled that, as written, they implicated constitutional rights. This conclusion did not necessarily flow from the statutory

> analysis. (Citations omitted). Also, this "result was not dictated by precedent existing at the time." (Citations omitted). Instead, the long-standing practice in the trial courts was to instruct the jury on murder and voluntary manslaughter consistent with the Illinois Pattern Jury Instructions. This court also did not invalidate these instructions in other cases it reviewed prior to *Reddick*.

149 Ill. Dec. at 313. This Court is inclined to agree with the rationale of the Illinois Supreme Court. *Reddick* outlawed jury instructions which had been firmly entrenched in the Illinois Pattern Instructions—they had not been declared erroneous prior to that decision. Similarly, when the Seventh Circuit declared that the erroneous instructions criticized in *Reddick* constituted a due process violation, it seemed to be announcing a new constitutional rule of criminal procedure. The Seventh Circuit in *Falconer* did not rest its decision upon other cases finding the same or similar jury instruction pattern to be unconstitutional.

Given that *Reddick* did announce a new rule, the only way it can be applied retroactively to Taylor's conviction is if it falls into one of the two recognized exceptions to the *Teague* general rule prohibiting retroactive application. The first exception is for new rules which place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prescribe." 489 U.S. at 307. The second exception allowing retroactive application is for a new rule which requires the observance of procedures which are "implicit in the concept of ordered liberty." *Id.* (Citations omitted).

These exceptions do not apply here. First, the *Reddick* rule did not place certain kinds of individual conduct beyond the power of the state to prescribe. As the Illinois Supreme Court stated in *Flowers*, "the conduct proscribed

in this case is murder, the prosecution of which is not prohibited by *Reddick*." Secondly, the rule announced in *Reddick* cannot be said to be a procedure implicit in the concept of ordered liberty. The phrase "implicit in the concept of ordered liberty" was borrowed from Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937). In that opinion, Justice Cardozo carved a very narrow interpretation of that concept—one which encompassed only the most cherished and most sacred of our constitutional rights. Indeed, Cardozo's examples of principles which are not implicit in the concept of ordered liberty (including trial by jury, criminal charge by indictment, and immunity from compulsory self-incrimination, 302 U.S. at 325) firmly establish that this category is reserved for overwhelmingly fundamental constitutional doctrines. This Court cannot say that the rule announced in *Reddick* and approved of in *Falconer* satisfied this criteria.

Having found that the due process standard articulated in *Reddick* and *Falconer* cannot be applied retroactively to Taylor's conviction, it is unnecessary to address the state's alternative contention that the erroneous instructions constituted harmless error. Without retroactive application of the standards in *Reddick* and *Falconer*, the instructions issued by the trial court in Taylor's trial do not amount to error and therefore a harmless error analysis is inappropriate.

CONCLUSION

Although the state concedes (and case law makes clear) that the jury instructions used in Taylor's trial constituted a violation of due process, such was not the law at the time Taylor's conviction became final. As such, those cases announcing the unconstitutionality of such jury instruc-

tions cannot provide the basis for habeas relief in this Court. Therefore, Taylor's Petition for Habeas Corpus Relief is hereby DENIED.

ENTERED this 19th day of December, 1990.

/s/ MICHAEL M. MIHM
Michael M. Mihm
United States District Judge

APPENDIX C

[Filed February 2, 1987]

NO. 4-86-0355

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

KEVIN TAYLOR,
Defendant-Appellant.

Appeal from the Circuit Court, County of Sangamon.
No. 85CF536
Honorable Simon L. Friedman, Judge Presiding.

JUSTICE GREEN delivered the order of the court:

On March 20, 1986, following a jury trial in the circuit court of Sangamon County, defendant, Kevin Taylor, was convicted of the offenses of murder and home invasion. He was subsequently sentenced to terms of 35 years' and 6 years' imprisonment, respectively, to be served concurrently. On appeal, defendant maintains (1) the trial court erred in failing to amend the jury instructions on murder to reflect that the State must negate the mitigating elements of voluntary manslaughter; and (2) the trial court erred in excluding testimony concerning alleged mistreatment of defendant's daughter to show defendant acted from serious provocation. We affirm.

Joyce Taylor, defendant's ex-wife, testified at trial that (1) on September 14, 1985, she and her daughter were living with her boyfriend, Scott Siniscalchi; (2) she received two calls on that date from defendant between 1:00 and 1:30 a.m.; (3) Scott answered the second call and told defendant to leave Joyce alone; (4) a short time after the second call, she heard the front door of her apartment being kicked in, and she saw defendant walking into the bedroom; (5) defendant climbed onto the bed, pulled a knife from behind his back, and told her not to move; (6) defendant and Scott struggled; (7) Scott said "the knife [was] in [him]"; (8) Scott fell to the floor, and defendant kicked him; (9) defendant pulled the phone cord out of the wall, said "I love you" and ran out of the apartment. Joyce further testified that in January 1985, she received a telephone call from defendant in which he threatened her and Scott, and threatened to kill himself. Other witnesses testified to the events of that morning and the previous evening, and Joyce's mother testified that defendant told her, a few months prior to the stabbing, that he would "get" Scott someday.

Witnesses for the defense testified that defendant had a "good" and "close" relationship with his daughter. A defense witness was prohibited from testifying about incidents when the daughter was left at defendant's house "in a filthy condition."

Defendant testified on his own behalf that Scott had argued with defendant on occasion, and, a month prior to the stabbing had laughed at him and antagonized him. He said that when he spoke to Scott on the morning of the stabbing, Scott indicated that defendant could not see his daughter the next day. Defendant stated that he drove across town at a speed of 60 to 70 miles per hour, took a hunting knife that was in the car, and knocked on

Joyce's apartment door. He said he heard his daughter crying and kicked in the door with the intent to take her away with him. Defendant testified that he saw Scott reach for something, and he jumped on him. They struggled, and he stabbed the victim. On cross-examination, defendant admitted that Scott made him angry and hurt his pride, but he said he was not jealous. Defendant also admitted parking his car down the street from the apartment and discarding the knife and the clothes he had been wearing during the stabbing.

The trial court agreed to give voluntary manslaughter instructions, based on sudden and intense passion, tendered by defense counsel. Moreover, the court refused the State's suggestion, based on *People v. Bolden* (1985), 132 Ill. App. 3d 1047, 477 N.E.2d 1380, to modify the murder issues instruction to contain an element requiring the State to negate the mitigating element of voluntary manslaughter. Defense counsel did not tender an instruction on that issue.

In *Bolden*, this court held that "when the defendant in a murder trial introduces scme evidence of intense passion or of unreasonable belief, it is to be treated as a partial affirmative defense and the burden is on the State to negate the elements which would lead to a verdict of voluntary manslaughter." (132 Ill. App. 3d 1047, 1058, 477 N.E. 2d 1380, 1387.) In *People v. Williams* (1985), 134 Ill. App. 3d 334, 339, 480 N.E.2d 205, 209, this court stated that "*where * * * the defense requests such an instruction*" (emphasis added), the court must instruct the jury of the State's burden.

Defendant now contends that the circuit court should have followed the State's suggstion and amended the proposed issues instruction on murder to require negation

of the mitigating element. The State responds by requesting that we reconsider *Bolden* and overrule it. The State cites *People v. Wright* (1986), 111 Ill. 2d 18, 488 N.E.2d 973, as being contra to *Bolden*. The *Wright* court did not concern itself with the form of instructions to be given in regard to murder but merely considered the question of whether defense counsel should have raised the defense of voluntary manslaughter. Nothing in the opinion requires the overruling of *Bolden*. However, when the defense failed at trial to request an instruction in conformity with *Bolden*, he waived that issue.

We do not consider the failure to instruct the jury on that issue to be plain error. The plain error exception to the waiver rule created by Supreme Court Rule 451(c) (87 Ill. 2d R. 451(c)) is of a limited nature and is restricted to the correction of "grave errors" or to situations where the case is close factually and fundamental fairness requires that the jury be properly instructed. (*People v. Huckstead* (1982), 91 Ill. 2d 536, 544, 440 N.E.2d 1248, 1252.) The instant case was not factually close, and the evidence did not indicate that there existed " '[serious provocation' " sufficient " 'to excite an intense passion in a reasonable person.' " (*People v. Crews* (1967), 38 Ill. 2d 331, 335, 231 N.E.2d 451, 453.) Defendant's assertions of provocation did not arise from the decedent's acts or relationship with Joyce. (See *People v. Wax* (1966), 75 Ill. App. 2d 163, 220 N.E.2d 600.) Rather it arose from the decedent's alleged treatment of defendant's daughter. Although a voluntary manslaughter instruction was given, the evidence in support thereof was not strong.

Finally, we do not consider the trial court to have abused its discretion in excluding evidence of alleged mistreatment of defendant's daughter to show the existence of serious provocation. The alleged incidents were too re-

mote and not of a nature recognized by the courts to constitute serious provocation. (*Crews.*) We find no error in the trial court's ruling.

For the reasons stated, we affirm.

Affirmed.

SPITZ, P.J., and LUND, J., concur.

APPENDIX D

181 Ill.App.3d 538, 536 N.E.2d 1312, 130 Ill.Dec. 101

The PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

Kevin W. TAYLOR,
Defendant-Appellant.

No. 4-88-0075.

Appellate Court of Illinois, Fourth District.

March 13, 1989.

Justice GREEN delivered the opinion of the court:

On March 20, 1986, after a jury trial in the circuit court of Sangamon County, defendant Kevin W. Taylor was convicted of murder and home invasion. Subsequently, he was sentenced to concurrent terms of 35 years' and 6 years' imprisonment, respectively. He then took a direct appeal to this court which entered an order affirming on February 2, 1987. (*People v. Taylor* (1987), 151 Ill.App.3d 1167, 113 Ill.Dec. 681, 515 N.E.2d 490 (order under Supreme Court Rule 23).) Defendant then filed a *pro se* petition under the Post-Conviction Hearing Act (Act) on February 23, 1987 (Ill.Rev.Stat. 1985, ch. 38, par. 122-1 et seq.). On December 23, 1987, the circuit court allowed the State's motion to dismiss the petition without an evidentiary hearing. Defendant has appealed. We affirm.

At trial, the circuit court granted a defense request that the jury be instructed as to voluntary manslaughter based upon sudden and intense passion. However, the court re-

jected the State's suggestion that the issues instruction in regard to murder be modified to require the State to negate the mitigating element of sudden and intense passion which would reduce the homicide to voluntary manslaughter as this court had indicated should be done in *People v. Bolden* (1985), 132 Ill.App.3d 1047, 87 Ill.Dec. 852, 477 N.E.2d 1380 (*Bolden I*). The court's failure to modify this instruction was one of the two claims of error raised on behalf of defendant on direct appeal. This court held defendant had waived any error by failing to request that the burden of proof instruction be modified.

In the instant petition for post-conviction relief, defendant asserted that he was deprived of his sixth amendment right to effective assistance of counsel because of trial counsel's failure to request the modification. Subsequent to the circuit court's decision dismissing the *pro se* petition, on June 20, 1988, the supreme court issued its decision in *People v. Reddick* (1988), 123 Ill.2d 184, 198, 122 Ill.Dec. 1, 7, 526 N.E.2d 141, 147, holding that failure of a circuit court to give the type of issues instruction which the State suggested here is "grave error" which cannot be waived. This overruled the precedent of our decision in *Bolden I*, on the direct appeal in this case, holding that such an error can be waived.

Citing *People v. Dredge* (1986), 148 Ill.App.3d 911, 102 Ill.Dec. 552, 500 N.E.2d 445, and *People v. Cowherd* (1983), 114 Ill.App.3d 894, 70 Ill.Dec. 460, 449 N.E.2d 589, defendant requests we relax the rules of *res judicata* and reconsider the propriety of our decision on direct appeal in light of *Reddick*. We need not rely upon giving *res judicata* effect to our decision on direct appeal to affirm. In a proceeding under the Act, we can only consider error which deprives of a constitutional right. In our decision rendered on this date in *People v. Bolden* (1989), 181 Ill.

App.3d 481, 130 Ill.Dec. 97, 536 N.E.2d 1308 (*Bolden II*), we have held that the *Reddick* court did not intend the "grave error" arising from the type of instructions used here to amount to constitutional error. Thus, we cannot consider any error on the part of the circuit court in giving the questioned issues instruction as to murder.

We do consider the question, raised in defendant's petition, of whether he was deprived of his constitutional right to counsel because that counsel did not request modification of the issues instruction on murder. In order to establish incompetence of trial counsel on that basis, the evidence would have to show that counsel's representation fell below a reasonable objective standard, thus depriving the defendant of a fair trial under circumstances where there was a reasonable probability that if a proper standard were followed, a different result would have been obtained. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Albanese* (1984), 104 Ill.2d 504, 85 Ill.Dec. 441, 473 N.E.2d 1246.

The evidence here was very weak that defendant acted with the "sudden and intense passion resulting from serious provocation by another" required by section 9-2(a) of the Criminal Code of 1961 (Ill.Rev.Stat. 1985, ch. 38, par. 9-2(a)) in force at the time of the alleged offense and as described in the instructions given by the court at trial. As we stated in our order of February 2, 1987, even by defendant's testimony, his passion was not sudden and the provocation was very questionable. Defendant admitted he had argued with the victim, who was defendant's estranged wife's live-in lover. Defendant stated that on the morning he stabbed the victim, he had spoken to him, and the victim had told defendant that the defendant could not see his young daughter the next day. The daughter was living with the mother and the victim. According to

defendant, he drove across town to the apartment where the child lived, at speeds of 60 to 70 miles per hour, took a hunting knife that was in his automobile, and knocked at his ex-wife's apartment. He stated he then heard his daughter crying and kicked in the door with the intent to take the child with him. Defendant testified he then saw the victim reach for something and jumped on him. According to defendant, they struggled, and he stabbed the victim.

For the stated reasons, the trial record clearly shows that a request by defendant's counsel for issues instructions conforming to *Reddick* and *Bolden I* would have been very unlikely to have resulted in defendant's homicide conviction having been voluntary manslaughter rather than murder.

Accordingly, we affirm.

AFFIRMED.

LUND and SPITZ, J.J., concur.

Supreme Court, U.S.
FILED
JUL 8 1992
OFFICE OF THE CLERK

(2)

No. 91-1738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JERRY D. GILMORE, Petitioner

-vs-

KEVIN TAYLOR, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Kevin Taylor, by and through his counsel, Robert Agostinelli, Deputy Defender, Office of the State Appellate Defender, Third Judicial District, requests leave to file the attached Respondent's Brief in Opposition, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The Respondent was previously granted leave to proceed in forma pauperis in this cause in the Illinois Appellate Court.

The Respondent's affidavit in support of this Motion is attached hereto.

Robert Agostinelli
ROBERT AGOSTINELLI

SUBSCRIBED AND SWORN TO
Before me this 7th day of
July, 1992.

Donna Barr
Notary Public

OFFICIAL SEAL
DONNA BARR
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-9-95

16 pgs

No. 91-1738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JERRY D. GILMORE, Petitioner

-vs-

KEVIN TAYLOR, Respondent

A F F I D A V I T

I, Kevin Taylor, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Unemployment $600.00 Per month [redacted] August. 1985

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No

_____

_____

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? ____

No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Katie Jean Taylor Daughter

_____

I understand that false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Further affiant sayeth not.

Kevin Taylor
KEVIN TAYLOR

SUBSCRIBED AND SWORN TO
Before me this 17 day
of June, 1992.
Robert L Price
Notary Public

" OFFICIAL SEAL "
ROBERT L. PRICE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 4/18/95

No. 91-1738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JERRY D. GILMORE, Petitioner

-vs-

KEVIN TAYLOR, Respondent

CERTIFICATE OF SERVICE

I, Robert Agostinelli, a member of the bar of this Court and representing Petitioner in this cause, certify:

(1) That I have served one copy of the Motion for Leave to Proceed in Forma Pauperis, the Affidavit in support thereof, and Respondent's Brief in Opposition on counsel for Respondent, by depositing same in a United States Post Office mail box, with first class postage prepaid, and with the envelope addressed as follows:

Hon. Roland Burris	Mr. Terence M. Madsen
Attorney General	Mr. Douglas K. Smith
100 W. Randolph - 12th Floor	Asst. Attorneys Generals
Criminal Appeals Division	500 S. Second Street
Chicago, Il. 606061	Springfield, Il. 62706

(2) The above named parties are the only parties required to be served.

Robert Agostinelli
ROBERT AGOSTINELLI

SUBSCRIBED AND SWORN TO
Before me this 7th day
of July, 1992.

Donna Barr
Notary Public

OFFICIAL SEAL
DONNA BARR
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-9-96

No. 91-1738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JERRY D. GILMORE, Petitioner

-vs-

KEVIN TAYLOR, Respondent

On Petition for Writ of Certiorari
To The
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT AGOSTINELLI*
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
1100 Columbus Street
Ottawa, Illinois 61350
(815) 434-5531

Counsel for Respondent

TIMOTHY P. O'NEILL
Professor of Law
John Marshall Law School
315 S. Plymouth Court
Chicago, Illinois 60604
(312) 987-2367

Of Counsel

*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

I. Has the State waived any claim of applying Teague v. Lane, 489 U.S. 288 (1989) to Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990)?

II. Should the State's belated claim that no due process violation occurred in the instant case be rejected since they conceded before both the district court and the Court of Appeals that the instructions at issue had, in fact, violated due process?

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I

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II

THIS COURT SHOULD REJECT THE STATE'S CLAIM THAT NO DUE PROCESS VIOLATION OCCURRED BECAUSE THE STATE CONCEDED BEFORE BOTH THE DISTRICT COURT AND COURT OF APPEALS THAT THE INSTRUCTIONS AT ISSUE HAD, IN FACT, VIOLATED DUE PROCESS. 6

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No. 91-1738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JERRY D. GILMORE, Petitioner

-vs-

KEVIN TAYLOR, Respondent

On Petition for Writ of Certiorari
To The
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

A copy of the relevant decisions including the January 21, 1992 decision of the United States Court of Appeals for the Seventh Circuit are appended to the certiorari petition.

JURISDICTION

This Court maintains jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Amplification and clarification of petitioner's factual statement have been incorporated within the argument.

ARGUMENT I

THIS COURT SHOULD REJECT THE STATE'S BELATED ATTEMPT TO APPLY TEAGUE V. LANE, 489 U.S. 288 (1989) TO FALCONER V. LANE, 905 F. 2D 1129 (7TH CIR. 1990) SINCE THE STATE FAILED TO RAISE THAT ISSUE IN THREE PRIOR CASES, INCLUDING FALCONER V. LANE ITSELF.

The centerpiece of the State of Illinois' Petition for Certiorari is a Teague v. Lane attack on Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), a two year-old Seventh Circuit habeas corpus decision. Teague v. Lane, 489 U.S. 288 (1989). This Court should deny the petition for certiorari because the State of Illinois failed to raise this Teague challenge in the Falconer case itself. Moreover, the State of Illinois failed to raise Teague v. Lane in two subsequent Seventh Circuit decisions granting writs of habeas corpus on the basis of Falconer. Denying the State of Illinois' petition will show that the State may not pick and choose when to raise a Teague v. Lane challenge. Because Teague v. Lane is a threshold, yet non-jurisdictional, issue in a habeas case, the State must "use it or lose it".

In the case at bar, the Seventh Circuit applied existing precedent -- its holding in Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990) -- in granting a writ of habeas corpus. In its Petition for Writ of Certiorari, the State of Illinois is now asking this Court to hold that the granting of the writ of habeas corpus in Falconer was barred by this Court's decision in Teague.

Note that the State is not claiming that the opinion in the case at bar created a new rule under Teague; rather, it is claiming that Falconer -- a decision over two years old -- violated Teague.

Interestingly, the State of Illinois never raised a Teague v. Lane issue in Falconer. The failure to raise the issue two years ago is proof per se that the State's position is untenable. Yet to fully appreciate the audacity of the State's position, it is important to understand the chronology of events affecting these issues.

On February 22, 1989, this Court decided Teague v. Lane, which held that new rules of criminal procedure should generally not be applied retroactively to cases on collateral review. This Court characterized retroactivity as a "threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Teague, 489 U.S. at 300. This Court has held that the Teague rule is not "jurisdictional" in the sense that a court must raise and decide the issue sua sponte. See Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 2718, 111 L. Ed. 2d 30 (1990). Rather, the goal of Teague is to prevent "'selective application of new rules [thus] violat[ing] the principle of treating similarly situated defendants the same'." [Teague, 489 U.S. at 304, quoting Griffith v. Kentucky, 479 U.S. 314, 323-324, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987) citing Desist v. United States, 394

U.S. 244, 258-259, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) (Harlan, J., dissenting].

As shown below, the State's belated Teague v. Lane claim flies in the face of the goal of Teague -- similar treatment for similarly situated defendants.

The State of Illinois filed its brief in Falconer v. Lane on October 13, 1989. Note that this is almost eight months after Teague v. Lane was decided. Its brief makes no mention of Teague v. Lane. Oral argument in Falconer was held February 26, 1990 -- over one full year after Teague v. Lane was decided. Again, the State of Illinois apparently made no use of Teague v. Lane. Indeed, in its opinion in Falconer the Seventh Circuit pointedly noted that the State had failed to raise a Teague v. Lane claim, thus obviating any need to even discuss the case. Falconer v. Lane, 905 F.2d 1129, 1137 (7th Cir. 1990).

Obviously, the State felt that Teague was inapplicable to a Falconer claim. Any lingering doubt on this score had to be removed when the Seventh Circuit relied on Falconer in granting a habeas corpus petition in Rose v. Lane, 910 F.2d 400 (7th Cir. 1990), cert. denied, 111 S. Ct. 515 (1990) and United States ex rel. Fleming v. Huch, 924 F.2d 679 (7th Cir. 1991). Both cases concerned the same faulty Illinois jury instructions; both decisions relied on Falconer in granting relief; in neither case did the State of Illinois raise a Teague v. Lane claim.

The State of Illinois long ago lost the right to raise a Teague v. Lane claim against the Falconer decision. Granting

this petition would reward the State of Illinois for sloppy lawyering. Granting this petition would vindicate a State's right to flout the holding of Teague v. Lane by arbitrarily discriminating among similarly situated defendants. Granting this petition would open the door to a defendant's claim that the State had an "improper motive" in singling him out for a Teague v. Lane claim. See Wade v. United States, No. 91-5771, 60 U.S.L.W. 4389, decided May 19, 1992.

The Court has shown a proper regard for raising and preserving issues in a timely manner. In Coleman v. Thompson, 501 U.S. ___, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), defendant's lawyers missed Virginia's notice of appeal deadline by three days; this precluded Coleman from receiving any federal review. Here, the State of Illinois' delay is not merely three days, but three cases. Such misuse of Teague must be met with a denial of the petition for a writ of certiorari.

ARGUMENT II

THIS COURT SHOULD REJECT THE STATE'S CLAIM THAT NO DUE PROCESS VIOLATION OCCURRED BECAUSE THE STATE CONCEDED BEFORE BOTH THE DISTRICT COURT AND COURT OF APPEALS THAT THE INSTRUCTIONS AT ISSUE HAD, IN FACT, VIOLATED DUE PROCESS.

In its Petition for Writ of Certiorari, the State of Illinois asks this Court to grant certiorari "to resolve a circuit split on the proper scope of the due process clause."

(Petition, p. 5). This constitutional issue was never raised by the State in either the district court or the Seventh Circuit. Because the State has provided no excuse for not having raised this issue in the courts below, this Court should deny the petition. See Patrick v. Burget, 486 U.S. 94, 99, n.5, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988) citing Youakim v. Miller, 425 U.S. 231, 234, 96 S. Ct. 1399, 47 L. Ed. 2d 701 (1976) (per curiam).

The opinion of the district court below explicitly states "The State concedes that, under the current state of the law, the jury instructions used in Taylor's trial amount to a due process violation." U.S. ex rel. Taylor v. Gilmore, 770 F. Supp. 445, 446 (C.D. Ill. 1990). Moreover, the opinion of the Seventh Circuit below notes that "Illinois prudently concedes that the instructions given Taylor's jury were defective, and challenge the vitality of neither [People v.] Reddick nor Falconer [v. Lane]." Taylor v. Gilmore, 954 F.2d 441, 442-443 (7th Cir. 1992). This blatant "sandbagging" by the State is reason enough to deny the petition for certiorari. Patrick, 486 U.S. at 99, n.5 ("This court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court"); Adickes v. Kress & Co., 398 U.S. 144, 147, n.2, 90 S. ct. 1598, 26 L. Ed. 2d 142 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them") citing Lawn v. United Sates, 355 U.S. 339, 362-3, n.16, 78 S. Ct. 311, 2

L. Ed. 2d 321 (1958); Husty v. United States, 282 U.S. 694, 701-02, 51 S. Ct. 240, 75 L. Ed. 629 (1931); Duignan v. United Sates, 274 U.S. 195, 200, 47 S. Ct. 566, 71 L. Ed. 996 (1927).

The State's failure to raise this issue before the lower courts a fortiori proves its lack of merit. Moreover, Judge Flaum's cogent opinion for a unanimous court fully explains the due process violation in this case. See Taylor, 954 F.2d at 450.

The State's failure to raise any due process issue in the lower courts merits a denial of its petition for certiorari.

CONCLUSION

For these reasons, respondent Kevin Taylor submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT AGOSTINELLI*
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
1100 Columbus Street
Ottawa, Illinois 61350
(815) 434-5531

Counsel for Respondent

TIMOTHY P. O'NEILL
Professor of Law
John Marshall Law School
315 S. Plymouth Court
Chicago, Illinois 60604
(312) 987-2367

Of Counsel

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ROLAND W. BURRIS
Attorney General of Illinois
ROSALYN B. KAPLAN
Solicitor General of Illinois
TERENCE M. MADSEN
Assistant Attorney General
MARK E. WILSON
Assistant Attorney General
STEVEN J. ZICK
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2139
Counsel for Petitioner

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ARGUMENT

I.

A RECENT DISPUTE WITHIN THE SEVENTH CIRCUIT FURTHER ILLUSTRATES WHY *FALCONER* ANNOUNCED A NEW RULE.

Although Taylor apparently elected not to mention it in his Brief in Opposition, Judge Easterbrook's separate opinion in the latest Seventh Circuit case addressing the constitutionality of the pattern jury instructions here at issue strongly supports the points presented in the Petition for Certiorari.

In *Flowers v. Illinois Department of Corrections*, 962 F.2d 703 (7th Cir.), *petition for cert. filed* (Aug. 5, 1992) (No. 92-253), the Seventh Circuit relied on the decision

below to hold that *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), announced an old rule that it could apply retroactively. *Flowers*, 962 F.2d at 705. Judge Easterbrook concurred, however. He conceded that stare decisis required the court to follow existing Seventh Circuit precedent, but he wrote that he "would not have decided *Falconer* and *Taylor* [*i.e.*, the decision below] in the same way." 962 F.2d at 707 (Easterbrook, J., concurring).

Judge Easterbrook wrote that the instructions do not violate the Due Process Clause essentially for the same reasons presented in Gilmore's Petition. He explained: "[I]f a state could choose to do something—choose, for example, to make self-defense an affirmative defense to murder . . .—then the federal inquiry is over; whether the state has indeed so chosen is a question of its domestic law." *Id.* at 711 (citing *Patterson v. New York*, 432 U.S. 197 (1977), and *Martin v. Ohio*, 480 U.S. 228 (1987)). Although some panels of the Seventh Circuit believe that errors under *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), violate the Due Process Clause, Judge Easterbrook does not. As a "reasonable jurist[ ]," Judge Easterbrook's concurrence in *Flowers* necessarily means that the lower court's restatement of *Falconer's* rationale established a new rule of criminal procedure. *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822, 2827 (1990).

II.

THE RESPONDENT HAS CONCEDED ALL THE REASONS PRESENTED IN THE PETITION FOR GRANTING A WRIT OF CERTIORARI.

The Brief in Opposition disputes none of the specific legal claims in the Petition. Indeed, Taylor does not contest that both state and federal courts have fundamentally disagreed over the constitutionality of the pattern instructions; that *Falconer*, coupled with the lower court's restatement of *Falconer's* rationale, radically and unpredictably extended criminal defendants' Due Process rights by effectively requiring correct jury instructions on affirmative defenses provided by state law; and that a circuit conflict exists over this extension of the Due Process Clause. Because Taylor did not respond to these reasons for granting the writ of certiorari in his Brief in Opposition, he has waived any challenge to these points. *City of Canton v. Harris*, 489 U.S. 378, 383-85 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

III.

THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS AMPLY PRESERVED IN THE LOWER COURTS.

Taylor argues essentially that the Court should not grant certiorari on the first question presented in the Petition because the law collaterally estops Gilmore from raising the question. Taylor's argument conflicts with long-accepted principles of collateral estoppel, so the Court should reject it.

Taylor argues that "the State of Illinois" elected not to raise, in certain earlier cases,[1] the legal issue of whether *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), applies retroactively on habeas corpus review. He concludes that the Court should not grant certiorari to resolve the question in this case, even though the question of retroactivity was raised and resolved on its merits in this case in the federal district court and the Seventh Circuit.

---

[1] Taylor mischaracterizes the parties to these other cases. The "State of Illinois" was not a party to any of the habeas corpus actions to which Taylor refers. In each of those cases, the respondent was an Illinois Department of Corrections official.

A litigant has no obligation, however, to raise every available legal issue in every lawsuit. The Court has repeatedly held that collateral estoppel does not bar litigation of an issue that a party could have presented in an earlier case but elected not to raise for whatever reason. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590, 597 (1962) (Goldblatt's victory in the first suit brought on one ground did not bar the town from presenting a different theory of recovery in a later suit); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 669-70 (1944) (election not to raise a defense in an earlier action did not preclude raising it in a later suit).

Furthermore, the logic of Taylor's argument would lead to absurd results. Taylor would have this Court forever foreclose the possibility of certiorari review of an issue just because a party did not raise the issue in the first possible case that permitted it. A party, however, should have discretion to decide not to raise an issue without worrying that it might be foreclosed from presenting it to this Court in a later, unrelated case. Parties, especially state parties in habeas corpus cases, decide what issues to raise in lawsuits based on many different considerations; the law of collateral estoppel should not compel them to raise every possible issue in every case.

Moreover, Taylor's secondary argument, that applying *Teague v. Lane*, 489 U.S. 288 (1989), to *Falconer* would violate *Teague*'s policy of treating similarly situated defendants the same, is puzzling at best. Respondent's Brief in Opposition, pp. 4-5. *Teague* indeed states that the retroactivity doctrine should treat similarly situated prisoners the same. 489 U.S. at 304. The various state respondents' decisions not to press a *Teague* claim in some earlier *Reddick* error habeas corpus cases, however, did not alter this policy of the retroactivity doctrine. The *law* still treats

similarly situated habeas petitioners similarly; those earlier state respondents simply did not assert all their legal rights.

Taylor also argues that "[g]ranting this Petition would open the door to a defendant's claim that the State had an 'improper motive' in singling him out for a *Teague v. Lane* claim." Respondent's Brief in Opposition, p. 6 (citing *Wade v. United States*, 112 S. Ct. 1840 (1992)). *Wade*, however, suggests the opposite result. In *Wade*, the Court held that Wade had made no "substantial threshold showing" that the government had violated his constitutional rights by refusing to seek a downward departure from the federal sentencing guidelines based on an improper motive. 112 S. Ct. at 1844. Even if a state employee can violate a habeas petitioner's constitutional rights by asserting a *Teague* defense based on an improper motive (which this Court has apparently never held), Taylor, like Wade, has presented no substantial threshold showing that Gilmore acted with any improper motive.

Finally, Taylor asserts that Gilmore did not preserve below the Petition's first question presented because Gilmore conceded that the pattern jury instructions violated the federal constitution. The first question presented, however, does not raise the constitutionality of the instructions. Rather, it asks the Court to decide whether *Falconer*, which (as modified by the decision below) radically expanded an already controversial proposition on a fundamental aspect of criminal procedure, applies retroactively. Contrary to Taylor's argument, the Petition points to a circuit split only as evidence that "reasonable jurists may disagree" over the constitutionality of the instructions, and that therefore *Falconer* and the decision below announced a new rule under *Teague*. *Sawyer v. Smith*, 110 S. Ct. at 2827.

CONCLUSION

Judge Easterbrook's concurrence in the latest case to address *Reddick* errors further illustrates that *Falconer*, as modified by the decision below, announced a new rule of criminal procedure. The Brief in Opposition presents no sound reason to deny a writ of certiorari on this issue. This Court should grant the writ.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois

TERENCE M. MADSEN
Assistant Attorney General

MARK E. WILSON
Assistant Attorney General

STEVEN J. ZICK
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2139

Counsel for Petitioner

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ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois

TERENCE M. MADSEN
MARK E. WILSON
MARCIA L. FRIEDL
Assistant Attorneys General

STEVEN J. ZICK
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2139

Counsel for Petitioner

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QUESTION PRESENTED

Is the lower court's holding, that the Due Process Clause requires state jury instructions in a murder case to permit the jury to consider the lesser offense of voluntary manslaughter where warranted by state law, a new rule under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny?

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No. 91-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The February 2, 1987, unpublished decision of the Illinois Appellate Court affirming Taylor's conviction on direct appeal appears in the appendix to the Petition for Certiorari [hereinafter Pet. App.] at 35. The March 31, 1989, decision of the Illinois Appellate Court, affirming the denial of Taylor's petition for post-conviction relief under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, ¶¶ 122-1 *et seq.* (1985), is published at 181 Ill. App. 3d 538, 536 N.E.2d 1312 (4th Dist. 1989), and is reprinted in the appendix to the Petition for Certiorari

at 40. The December 19, 1990, unpublished decision of the United States District Court for the Central District of Illinois, which denied Taylor habeas corpus relief on retroactivity grounds, is reprinted in the appendix to the Petition for Certiorari at 26. The January 21, 1992, decision of the United States Court of Appeals for the Seventh Circuit is reported at 954 F.2d 441 (7th Cir. 1992), and is reprinted in the appendix to the Petition for Certiorari at 1.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on January 21, 1992. On April 14, 1992, Justice Stevens granted the Petitioner's motion for an extension of time to file the Petition for Certiorari from April 20, 1992, to and including April 27, 1992. The Petitioner filed the Petition on April 27, 1992. On October 5, 1992, this Court granted the Petition limited to Question 1 presented by the Petition. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and § 2101(c) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case puts in issue the Fourteenth Amendment's Due Process Clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The case also puts in issue 28 U.S.C. § 2254(a) (1988): "The Supreme Court, a Justice, thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

STATEMENT OF THE CASE

I. The Homicide

On September 13, 1985, Joyce Taylor put her daughter Katie to bed and went to bed herself just after 9:00 p.m. (J.A. 11). Her boyfriend, Scott Siniscalchi, who also lived in the apartment, went to bed at that time as well. (J.A. 11). Joyce went to bed early because she had to arise very early the next morning for work. (J.A. 13).

Just before 1:00 a.m., Kevin Taylor, Joyce's ex-husband, called the apartment and Joyce answered. (J.A. 11). They talked for a few moments until Joyce explained that she had to go back to bed because she had to work an early shift the next day. (J.A. 12-13). Kevin then asked her if she was "still with Scot [sic]." (J.A. 12). She said that she was and repeated that she had to get some sleep. (J.A. 13). Kevin accused her of being rude and hung up the phone. (J.A. 13).

A few minutes later the phone rang again. (J.A. 13). Joyce thought it would be Kevin again, so she asked Scott to answer the phone. (J.A. 13). Kevin asked to talk to Joyce. (J.A. 14). Scott told Kevin to leave Joyce alone. (J.A. 14). The conversation lasted less than one minute, and Scott and Joyce then went back to sleep. (J.A. 14).

Joyce and Scott next awoke about forty-five minutes later to the sound of Kevin kicking their door in. (J.A. 14; Transcript, [hereinafter Tr.] vol., XII, at 108). Kevin had broken into the apartment despite the three locks on the door. (J.A. 22). He appeared at the entrance to the bedroom and walked toward the bed. (J.A. 14, 16). Kevin climbed onto the bed; Scott and Joyce backed up against the wall. (J.A. 17). He ordered them to "[s]tay right there; don't move," and reached behind him to pull out a large hunting knife that he had brought with him from his car. (J.A. 17, 79). Kevin had a calm voice and appeared to know what he was doing. (J.A. 17).

Joyce and Scott both pleaded with Kevin, but Kevin climbed onto Scott with the knife. (J.A. 17). Scott and Kevin struggled as Joyce crawled off the bed to go to the phone. (J.A. 18). As she approached the phone, she heard Scott exclaim, "The knife's in me Joyce; the knife's in me." (J.A. 18).

Scott and Kevin came into the living room. (J.A. 19). Scott was covered with blood. (J.A. 19). As Joyce ran to the phone, Kevin said, "You don't want to do that" and "I love you." (J.A. 19). He then ripped the phone out of the wall. (J.A. 19). Joyce grabbed her daughter and ran out of the apartment. (J.A. 19). As she left, she saw Kevin kick or knee Scott in the abdomen. (J.A. 20). Scott would soon die from a massive external hemorrhage caused by seven stab wounds. (J.A. 44).

While Joyce was at a neighbor's door downstairs, Kevin ran past her and out the front door of the building. (J.A. 20). After Kevin left the building, he slammed the front door and ran toward his car. (J.A. 20; Tr. vol. XII, at 109, 112-13). He had parked his car down the street rather than in front of Joyce's and Scott's apartment. (J.A. 88). Kevin then drove his car back to his home. On the way,

he stripped off all his clothes and threw them in a trash can. (J.A. 91). He also threw away the hunting knife that he used to kill Scott. (J.A. 92).

When he arrived at his home, he put some of his own blood on a paring knife and told the police that he had cut himself; he intended to create false evidence and lie to the police about a cut on his arm. (J.A. 92-93). Kevin admitted at trial that he broke into the apartment armed with the hunting knife. (J.A. 87-88). He also alleged at trial that he only went to the apartment that night to pick up his daughter. (J.A. 87). He never mentioned Katie to the police that night, however. (J.A. 93).

Kevin had repeatedly threatened to kill Scott in the past. For example, in January, 1985, Joyce was at her mother's home when Kevin kept calling her late at night and threatening her. (J.A. 23). Joyce called the police. (J.A. 23). Kevin called again after a police officer had arrived, and the officer listened to the call on another extension. They both heard Kevin proclaim that "someday he was going to get [Scott]. He was going to kill him someday." (J.A. 24, 45). In addition, Joyce's mother testified that in the summer of 1985 Kevin told her: "I'm going to get Scot [sic] someday. It might take a while but I'll get him." (J.A. 42).

II. The Murder Trial and Taylor's Direct Appeal

The People of the State of Illinois indicted Taylor for the murder[1] of Scott Siniscalchi and for home inva-

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[1] Illinois law defined murder at the time as follows:

> A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(Footnote continued on following page)

sion.[2] After the People concluded their case at trial, the court held the first jury instruction conference. The prosecution proffered a murder instruction that mirrored the Illinois pattern instructions.[3] The instruction required the prosecution to prove, beyond a reasonable doubt, the ele-

[1] *continued*

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

Illinois Criminal Code of 1961 [hereinafter ICC] § 9-1(a), Ill. Rev. Stat. ch. 38, ¶ 9-1(a) (1985). Upon conviction, a court could sentence a murderer from twenty to forty years. Unified Code of Corrections [hereinafter UCC] § 5-8-1(a)(1)(a), Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(1)(a) (1985).

[2] Illinois law defined home invasion as follows:

A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present and

(1) While armed with a dangerous weapon uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or

(2) Intentionally causes any injury to any person or persons within such dwelling place.

ICC § 12-11(a), Ill. Rev. Stat. ch. 38, ¶ 12-11(a) (1985). Home invasion triggered a sentence of six to thirty years. ICC § 12-11(b), Ill. Rev. Stat. ch. 38, ¶ 12-11(b) (1985); UCC § 5-8-1(a)(3), Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(3) (1985).

[3] Illinois Sup. Ct. Comm. on Pattern Jury Instructions in Criminal Cases, *Illinois Pattern Jury Instructions—Criminal* §§ 7.01 & 7.02, at 57-59 (2d ed. 1981) [hereinafter IPI]. All the relevant instructions actually given at Taylor's trial are reproduced in the joint appendix at 128-131.

ments of the crime of murder: (1) that Taylor performed the acts that caused Scott's death and (2) that Taylor either intended to kill or cause great bodily harm, knew that his acts would cause death or great bodily harm, knew that his acts created a strong possibility of death or great bodily harm or was committing the offense of home invasion. (J.A. 51, 128-29). Taylor's counsel noted that the instruction was from the Illinois pattern instruction book and stated that he had no objection to it. (J.A. 51).

After Taylor put on his case, the court held another jury instruction conference to address instructions proffered by the defense. Taylor's counsel asked the court to instruct the jury on voluntary manslaughter, which provided a lesser penalty than murder if the killer acted out of sudden and intense passion caused by serious provocation. (J.A. 93).[4] The prosecutor objected, arguing that Taylor had not put on any evidence to support voluntary manslaughter. (J.A. 93-95).

[4] Illinois law defined voluntary manslaughter, in relevant part, as follows:

A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

ICC § 9-2(a), Ill. Rev. Stat. ch. 38, ¶ 9-2(a) (1985). Voluntary manslaughter carried a sentence of four to fifteen years. ICC § 9-2(c), Ill. Rev. Stat. ch. 38, ¶ 9-2(c) (1985); UCC § 5-8-1(a)(4), Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(4) (1985).

The court overruled the prosecutor's objection and agreed to instruct the jury on voluntary manslaughter. Taylor's counsel tendered an instruction on voluntary manslaughter that followed the Illinois pattern instruction with one slight modification. (J.A. 96).[5] The instruction required, to sustain a charge of voluntary manslaughter, that the "evidence prove" the two elements of murder noted above and that Taylor acted under a sudden and intense passion resulting from serious provocation. (J.A. 96, 130).

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[5] The pattern instruction read in relevant part:

> To sustain the charge of voluntary manslaughter, the State must prove the following propositions:
>
> *First*: That the defendant performed the acts which caused the death of _____; and
>
> *Second*: That when the defendant did so,
>
> [1] he intended to kill or do great bodily harm to _____;
>
> or
>
> [2] he knew that such acts would cause death or great bodily harm to _____;
>
> or
>
> [3] he knew that such acts created a strong probability of death or great bodily harm to _____; and
>
> *Third*: That when the defendant did so,
>
> [1] he acted under a sudden and intense passion resulting from serious provocation by another;
>
> or
>
> [2] he acted under a sudden and intense passion resulting from serious provocation by some other person he endeavored to kill, but he negligently or accidentally killed _____.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

IPI § 7.04, at 62.

Before closing arguments, the prosecutor asked the court, on his own motion and without any request by Taylor's counsel, to amend the murder instruction. He asked the court to instruct the jury that the *prosecution* must prove beyond a reasonable doubt, as part of its murder case, that Taylor did *not* act under a sudden and intense passion resulting from serious provocation. (J.A. 97-101). The prosecutor requested this instruction even though it made his case more difficult because he believed that the Illinois Appellate Court's recent decision in *People v. Bolden*, 132 Ill. App. 3d 1047, 477 N.E.2d 1380 (Ill. App. Ct. 4th Dist.), *appeal denied*, 108 Ill. 2d 574 (1985), required it. (J.A. 97-101). The court refused to instruct the jury as the prosecutor requested despite *Bolden* and despite Taylor's failure to object, however, saying that he would "give the Appellate Court another shot at it." (J.A. 101).

After deliberating for one hour and twenty minutes, the jury returned a verdict of guilty of murder and guilty of home invasion. (J.A. 131). The court sentenced Taylor to thirty-five years in prison on the murder conviction. (J.A. 133).

Taylor appealed to the Illinois Appellate Court and argued, citing *Bolden* as the prosecutor had at trial, that the murder instruction should have required the People to prove beyond a reasonable doubt that Taylor did not act under a sudden and intense passion caused by serious provocation. (Pet. App. 37). The Illinois Appellate Court affirmed in an unpublished order, finding that Taylor had waived this issue by not joining the prosecution's request for the "*Bolden* instruction" at trial. (Pet. App. 37-38). The Illinois Supreme Court denied Taylor's petition for leave to appeal on June 4, 1987, and Taylor did not petition this Court for a writ of certiorari.

III. The Illinois Post-Conviction Proceeding

Taylor filed a petition for post-conviction relief under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, ¶¶ 122-1 *et seq.* (1985), arguing that he was denied effective assistance of counsel in violation of the Sixth Amendment because his trial lawyer had not joined the request for a *Bolden* instruction. The trial court dismissed the petition.

After Taylor filed his notice of appeal to the Illinois Appellate Court, the Illinois Supreme Court issued its decision in *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), which invalidated the pattern murder and voluntary manslaughter instructions because, if literally followed by a jury, they would prevent the jury from ever finding that a defendant committed voluntary manslaughter. 123 Ill. 2d at 194-95, 526 N.E.2d at 145. In his appellate brief, Taylor argued that *Reddick* required the court to reverse. The court rejected Taylor's argument, holding that, while *Reddick* would have required reversal on direct review, the case invalidated the instructions on state law rather than on constitutional grounds. Because prisoners may only receive post-conviction relief in Illinois for constitutional error, the court affirmed. (Pet. App. 41-42).

The court also rejected Taylor's Sixth Amendment claim because "[t]he evidence here was very weak that defendant acted with the 'sudden and intense passion resulting from serious provocation by another' " as the voluntary manslaughter law required. (Pet. App. 42 (quoting ICC § 9-2(a)). The court noted that, even by Taylor's own testimony, "his passion was not sudden and the provocation was very questionable." (Pet. App. 42). For these reasons, the court held that it would have been "very unlikely" that Taylor's jury would have found him guilty

of voluntary manslaughter rather than murder even if his lawyer had requested a proper instruction. (Pet. App. 42-43). The Illinois Supreme Court denied Taylor's petition for leave to appeal from this judgment on October 5, 1989.

IV. The Federal Habeas Corpus Proceeding

Taylor proceeded to federal court, filing a petition for a writ of habeas corpus in the United States District Court for the Central District of Illinois. The court denied Taylor's petition. The court noted that the Seventh Circuit's recent decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), had held that *Reddick* errors did in fact violate the Fourteenth Amendment's Due Process Clause, contrary to the Illinois Appellate Court's holding in Taylor's state post-conviction proceeding. However, the court held that *Reddick* constituted a "new rule" of criminal procedure that could not be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). The court principally relied upon *People v. Flowers*, 138 Ill. 2d 218, 561 N.E.2d 674 (1990), in which the Illinois Supreme Court explicitly adopted the *Teague* retroactivity analysis for state post-conviction proceedings and held that *Reddick* announced a new constitutional rule under *Teague*. (Pet. App. 31-32).

The United States Court of Appeals for the Seventh Circuit reversed. The court held, directly contrary to the Illinois Supreme Court's *Flowers* decision (without citing it) and directly contrary to the district court's decision relying on *Flowers*, that *Reddick* did not announce a constitutional rule at all. Rather, the Seventh Circuit found that its own decision in *Falconer* first held that *Reddick* errors violated the Due Process Clause. The court reasoned, therefore, that the appropriate *Teague* inquiry asks whether *Falconer*, not *Reddick*, announced a new rule.

The court held that *Falconer*'s result was dictated by *Boyde v. California*, 494 U.S. 370 (1990), and *Connecticut v. Johnson*, 460 U.S. 73 (1983), and that, as such, it did not announce a new rule under *Teague*. (Pet. App. 21-23).

SUMMARY OF ARGUMENT

In this habeas corpus action, the Seventh Circuit held that jury instructions, which state and federal courts have considered constitutional for over twenty years, violated the Fourteenth Amendment's Due Process Clause because they might have prevented Taylor's jury from convicting Taylor of voluntary manslaughter, a lesser offense provided by state law, as an alternative to murder. The court also applied its due process holding retroactively because it believed that cases from this Court compelled this application of the Due Process Clause. The court was wrong on both points.

Under the Due Process Clause, jury instructions must inform the jury that the state must prove every element of a charged crime beyond a reasonable doubt. The jury instructions used at Taylor's trial met this due process requirement. Although Taylor's instructions violated state law by permitting the jury to find Taylor guilty of murder without considering his affirmative defense (that he at most committed voluntary manslaughter), mere errors of state law do not violate due process.

Many cases that this Court decided before Taylor's conviction became final establish that the Due Process Clause does not require correct jury instructions on affirmative defenses. A number of circuit courts have agreed, and

many state and federal courts have found no constitutional problem with pattern instructions virtually identical to those given at Taylor's trial because of these cases. At a minimum, therefore, the lower court's holding was susceptible to debate among reasonable minds. For this reason, the court erred by applying its holding retroactively to a habeas corpus petitioner.

ARGUMENT

THE SEVENTH CIRCUIT ERRED BY APPLYING ITS HOLDING RETROACTIVELY BECAUSE NO SUPREME COURT PRECEDENT EXISTING WHEN TAYLOR'S CONVICTION BECAME FINAL WOULD HAVE COMPELLED A COURT TO HOLD THAT FAULTY INSTRUCTIONS VIOLATE DUE PROCESS EVEN IF THE JURY WAS CORRECTLY INSTRUCTED ON THE ELEMENTS OF THE CHARGED OFFENSE.

A. Federal Courts Generally Cannot Grant Habeas Corpus Relief Based on New Principles of Law.

On June 4, 1987, the Illinois Supreme Court denied Taylor's petition for leave to appeal from the Illinois Appellate Court's judgment affirming his conviction on direct appeal. (Pet. App. 5). At the latest, therefore, his conviction became final on September 2, 1987, when his time for filing a petition for certiorari to this Court expired. *Cf. Stringer v. Black*, 112 S. Ct. 1130, 1134 (1992) (conviction became "final," for retroactivity purposes, when this Court denied certiorari). On that date, existing precedent from this Court would not have "compelled" any court to find that his murder and voluntary manslaughter jury instructions violated the Due Process Clause; indeed,

if anything, existing precedent compelled the opposite result. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). For this reason, this Court should reverse and hold that Taylor has invoked a new rule.

Unless an exception applies, a federal court cannot grant habeas corpus relief to a prisoner based on a new rule of law. *Teague v. Lane*, 489 U.S. 288, 305-10 (1989) (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989). Although courts may sometimes struggle to determine whether a rule is "new" under *Teague*, this Court has announced a number of principles to guide the *Teague* new-rule inquiry. A decision announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301; *Stringer*, 112 S. Ct. at 1135. The new-rule principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990).

The question is not, under *Teague*, whether a decision is "within the 'logical compass' of" or whether a decision is " 'controlled' by" an earlier decision. *Id.* at 415. Rather, a federal court must inquire " 'whether a state court considering [the prisoner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [the prisoner] seeks was required by the Constitution.' " *Wright v. West*, 112 S. Ct. 2482, 2500 (1992) (Souter, J., concurring) (quoting *Saffle v. Parks*, 494 U.S. at 488). Under these settled principles, the Seventh Circuit erred by holding that Taylor's jury instructions violated the Due Process Clause under an old rule.

B. The Lower Court Announced a New Rule Because Settled Supreme Court Precedent Establishes That Jury Instructions Cannot Violate the Due Process Clause Unless They Prevent a Jury From Considering Evidence Relating to an Element of the Charged Crime.

As *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), made clear, Taylor's conviction violated Illinois law because the jury instructions might have prevented the jury from finding that Taylor committed voluntary manslaughter rather than murder. 123 Ill. 2d at 193-97, 526 N.E.2d at 144-45. *See also Falconer v. Lane*, 905 F.2d 1129, 1136 (7th Cir. 1990). As this Court has "stated many times," however, " 'federal habeas corpus relief does not lie for errors of state law.' " *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, ___ (1990)); *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Taylor's habeas corpus petition presents the question, therefore, whether the jury instruction error first identified in *Reddick* violates the Due Process Clause. Contrary to the lower court's holding, the Due Process Clause did not require a state to instruct a jury correctly on manslaughter in a murder case.

It is true that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). For example, a state may not instruct a jury that it must presume the existence of an element of a charged offense from other facts. *Francis v. Franklin*, 471 U.S. 307, 313-25 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 696-704 (1975). Such presumptions violate the Due Process Clause because they risk conviction without proof beyond a reasonable doubt of a fact that a state consid-

ered " 'so important that it must be either proved or presumed.' " *Francis*, 471 U.S. at 317 (quoting *Patterson v. New York*, 432 U.S. 197, 215 (1977)). "[T]he requirement of proof beyond a reasonable doubt in a criminal case [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring). When a jury must make the momentous choice between guilt and innocence, our Constitution requires strong proof of guilt to protect the innocent.

As this Court has recognized, however, the choice between murder and a lesser offense, such as manslaughter, does not evoke a similar value choice so fundamental to our society as to trigger scrutiny under the Due Process Clause. A fact relevant only to a lesser offense—in this case, sudden and intense passion caused by serious provocation—does not implicate the Due Process Clause because a state has no constitutional obligation to permit defendants to plead and prove affirmative defenses like manslaughter in the first place.

The Court effectively established that the Due Process Clause does not require the states to offer a manslaughter defense in murder cases in *Patterson v. New York*. The defendant argued in *Patterson* that the Due Process Clause prohibited New York from imposing upon him the burden of proving an affirmative defense that would lessen his crime from murder to manslaughter. 432 U.S. at 201. The Court rejected this argument, reasoning that the Due Process Clause does not require state law to offer manslaughter as an alternative to murder, so *a fortiori* it did not require the state to disprove the manslaughter defense. *See id.* at 207-08 ("The Due Process Clause . . . does not put New York to the *choice of abandoning those defenses* . . .

in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment," suggesting that due process did not prevent New York from abandoning manslaughter) (emphasis added).[6] Although this Court has apparently never explicitly stated that an accused has no due process right to a lesser offense instruction even though warranted by state law (see *Beck v. Alabama*, 447 U.S. 625, 638 n.14 (1980), leaving the question open), many circuit courts have quite reasonably adopted this position.[7]

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[6] *Accord id.* at 228 (Powell, J., dissenting) ("But nothing in *Mullaney* or *Winship* precludes a State from abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder") (footnote omitted); *McKoy v. North Carolina*, 494 U.S. 433, 450 (1990) (Blackmun, J., concurring) (*Patterson* was premised on the principle that state law need not provide a lesser offense as an alternative to murder); *Medina v. California*, 112 S. Ct. 2572, 2580 (1992) ("The Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused"); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (state procedure does not violate due process just because "another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar"); Ronald J. Allen, MULLANEY v. WILBUR, *the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 Tex. L. Rev. 269, 284-91 (1977) [hereinafter Ronald J. Allen, *Legitimate Intervention*] (*Winship* triggers this greater-includes-the-lesser analysis).

[7] At least four circuits have held or stated that jury instructions can never violate the Due Process Clause merely because they deprive a defendant of a lesser offense as provided by state law. *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir.) (en banc), *cert. denied*, 496 U.S. 929 (1990); *Valles v. Lynaugh*, 835 F.2d 126, 127-28 (5th Cir. 1988); *Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987) (per curiam); *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976) (per curiam) (dictum). Three other circuits have held that the Due Process Clause generally does not require an instruction on a lesser offense but that failure to give such an instruction might violate due process if it constitutes a fundamental miscarriage of

(Footnote continued on following page)

It would make little sense to reason that the Due Process Clause permits states to abolish the manslaughter affirmative defense altogether, as the *Patterson* Court did, but still hold that when a state nonetheless permits a jury to consider manslaughter, the Due Process Clause requires that it do so with accurate instructions. Such a rule of due process would depend wholly on state law. For example, in *Engle v. Isaac*, 456 U.S. 107 (1982) (which, as the Seventh Circuit conceded below, is "markedly similar" to this case, 954 F.2d at 449 (Pet. App. 15)), the lower court

[7] *continued*
justice under *Hill v. United States*, 368 U.S. 424, 428 (1962). *See Tata v. Carver*, 917 F.2d 670, 671-72 (1st Cir. 1990); *Trujillo v. Sullivan*, 815 F.2d 597, 602-04 (10th Cir. 1987); *Nichols v. Gagnon*, 710 F.2d 1267, 1272 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984).

Although these latter circuits correctly hold that due process generally does not require the giving of a lesser offense instruction, they are wrong to suggest that the failure to give such an instruction, in and of itself, could ever be so fundamentally unfair as to violate due process. The Due Process Clause's fundamental fairness guarantee either requires a state court to instruct a jury on an available affirmative defense when warranted by state law or it does not. "There is, after all, only one Due Process Clause of the Fourteenth Amendment." *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

Only the Third Circuit has grafted the Due Process Clause onto every state law requiring a lesser offense instruction, see *Vujosevic v. Rafferty*, 844 F.2d 1023 (3d Cir. 1988), but even that court has recently suggested that *Vujosevic* might no longer be good law. *Geschwendt v. Ryan*, 967 F.2d 877, 884 n.13 (3d Cir.) (en banc), *cert. denied*, 61 U.S.L.W. 3355 (U.S. Nov. 10, 1992).

As one commentator observed after this Court decided *Mullaney v. Wilbur*, "[t]here are cogent reasons to believe . . . that the Court did not intend to constitutionalize provocation." Ronald J. Allen, *Legitimate Intervention*, 55 Tex. L. Rev. at 284 n.82. Among other reasons, such a holding would mark the first time that the Court ever required a certain form of mens rea under the Constitution. "[C]aution suggests awaiting an explicit statement by the Court before concluding that it has decided to take what would be regarded as so major a step." *Id.*

had held that Ohio bore the burden of disproving self-defense under the Due Process Clause because state law imposed that burden and "fundamental fairness and therefore due process require [the state] to meet the burden that it chose to assume." *Isaac v. Engle*, 646 F.2d 1129, 1135 (6th Cir. 1980) (en banc), *rev'd*, 456 U.S. 107 (1982). This Court soundly dismissed that analysis and held that Isaac's jury instructions, although concededly incorrect under state law, did not violate the Due Process Clause. 456 U.S. at 119-21.

As this Court reasoned in *Isaac*, "[a] State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime." *Id.* at 120 (footnote omitted). Even though Ohio indeed intended to require the state to disprove self-defense and Isaac's jury instructions thwarted that intention, the Court refused to find a due process violation unless the aberrant instruction related to an element of the crime. "If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.' " *Id.* at 121 n.21 (quoting *Gryger v. Burke*, 334 U.S. 728, 731 (1948)).[8]

Isaac differs from this case in only one small way: the *Isaac* jury instruction error wrongly imposed the burden of persuasion for an affirmative defense on the defendant, while the *Reddick* error in this case potentially removed

[8] Justice Stevens fully agreed with the Court's reasoning on this issue. 456 U.S. at 136-37 (Stevens, J., concurring in part and dissenting in part). Although two members of the Court dissented in *Isaac*, the dissenting opinion does not dispute this holding of the majority. *Id.* at 137-51 (Brennan, J., dissenting, joined by Marshall, J.).

an affirmative defense from the jury's consideration. This distinction cannot have any relevance to a due process analysis, however, because the potential harm to Taylor from the *Reddick* error is no greater than the harm he would have incurred if Illinois law had not provided for an affirmative defense of voluntary manslaughter in the first place.[9]

As Judge Easterbrook has explained in a recent decision addressing the pattern instructions invalidated in *Reddick*: "Federal courts promote justice by ensuring that states respect constitutional rules to which they may be hostile; there is no comparable role in helping states to enforce those rules they have adopted on their own." *Flowers v. Illinois Dep't of Corrections*, 962 F.2d 703, 711 (7th Cir.) (Easterbrook, J., concurring), *petition for cert. filed*, 61 U.S.L.W. 3150 (U.S. Aug. 25, 1992) (No. 92-253). Jury instructions, in other words, only raise due process questions when they might prevent the jury from considering evidence relevant to an element of the charged crime:

> Only when the Constitution makes the resolution (in the state's favor) of some particular fact an essential ingredient of criminal condemnation does it make sense to hold . . . that the instructions to the jury must elicit the jury's determination of that item. . . . Whatever federal role there may be in ensuring that the state supply the minimum justification for *some* criminal punishment does not extend to patrolling the details of the offenses states choose to define.

Cole v. Young, 817 F.2d 412, 438-39 (7th Cir. 1987) (Easterbrook, J. dissenting) (footnote omitted).

Any more expansive a reading of the Due Process Clause would open the federal courts to a hornet's nest of state procedural issues; habeas courts would serve as little more than another level of appeal available to prisoners after they exhaust their state remedies. *Cf. Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991); *Brown v. Allen*, 344 U.S. 443, 540-41 (1953) (Jackson, J., concurring). *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). If Taylor's jury instruction error violates the Due Process Clause, it is hard to conceive of a state procedural error that would not. Indeed, the lower court's reasoning would extend to innumerable affirmative defenses defined in innumerable ways by state legislatures. As Judge Posner has written for the Seventh Circuit, "if we must decide whether . . . a lesser-included-offense instruction was correctly refused—how shall we avoid having to determine every other issue of state procedure that might have a bearing on the accuracy of the state court's determination of guilt?" *Nichols v. Gagnon*, 710 F.2d at 1271.

It goes without saying that our federal system requires that some federal interest underlie an extension of the Due Process Clause to a state procedure. Ronald J. Allen, *Legitimate Intervention*, 55 Tex. L. Rev. at 279 & n.62. This Court essentially held in *Patterson* that, while proof beyond a reasonable doubt of the elements of a charged

---

[9] The Due Process Clause nonetheless places some outer limits on the states' ability to impose significant criminal sanctions on people when their trials are "inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. at 428. *See generally* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 Harv. L. Rev. 321 (1980) (*Winship* implies some substantive limit on state criminal law); John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325 (1979) (same). This case falls well within the bounds of due process, however; Taylor has suffered no more unfairness than Mr. Isaac and his co-respondents did.

crime was so fundamental to our society that the Due Process Clause required it, proof of affirmative defenses presented no such federal interest. *Patterson*, 432 U.S. at 210 ("Traditionally due process has required that only the most basic procedural safeguards be preserved; more subtle balancing of society's interests against those of the accused have been left to the legislative branch"). By affirming the lower court, this Court would radically retreat from this settled maxim of federalism.

If this argument is even *reasonable—i.e.*, if it could have persuaded reasonable judges at the time Taylor's conviction became final—let alone if it is correct, then the contrary analysis applied by the Seventh Circuit below depends upon a new rule. *E.g.*, *Butler*, 494 U.S. at 415.

The Seventh Circuit held that Taylor's instructions violated the Due Process Clause because a reasonable likelihood existed that Taylor's jury found that he committed murder without considering whether he committed voluntary manslaughter instead. 954 F.2d at 452-53 (Pet. App. 21-23). The court found this holding "compelled" by *Boyde v. California*, 494 U.S. 370 (1990), and *Connecticut v. Johnson*, 460 U.S. 73 (1983). The court fundamentally erred in this analysis. Neither case supports that proposition; to the contrary, both cases are consistent with the contrary, correct principle set forth above.

First, the Seventh Circuit stated that, when reviewing the sufficiency of ambiguous instructions, the court must ask " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in' *an invalid manner*." 954 F.2d at 452-53 (Pet. App. 21) (quoting *Boyde*, 494 U.S. at 380) (emphasis added). In this passage, the lower court misleadingly excluded the last half of the quoted sentence from *Boyde*. The *Boyde* Court actually

held that "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in *a way that prevents the consideration of constitutionally relevant evidence*." 494 U.S. at 380 (emphasis added). An obvious difference exists between "invalid" instructions—by which the Seventh Circuit meant instructions that permitted a jury to find a defendant guilty without considering an affirmative defense permitted by state law—and instructions that relate to "constitutionally relevant evidence." Simply put, heat-of-passion evidence, which is the only evidence that Taylor's jury might not have considered, is not "constitutionally relevant" because an accused has no constitutional right to an affirmative defense instruction. *See supra*, pp. 15-22.

Second, this Court decided *Boyde* more than two years after Taylor's conviction became final. Accordingly, *Boyde* could only have dictated the result below if *Boyde* itself was dictated by a principle existing when Taylor's conviction became final. *Saffle v. Parks*, 494 U.S. at 494. It was not. As the *Boyde* Court itself explained, "[t]he legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence is less than clear from our cases." 494 U.S. at 378. Indeed, this Court stated that its earlier opinions on this issue had "produced a variety of tests and standards," and the Court went to great lengths to comment on the inconsistency of earlier cases to explain why the Court should settle on one specific standard. *Id.* at 378-80. Since this Court decided *Boyde* after Taylor's conviction became final and because earlier cases did not dictate *Boyde*'s holding, *Boyde* could not have dictated the result below.

The lower court also fundamentally erred by believing that *Connecticut v. Johnson* dictated the result below. First, *Johnson* did not even address whether a jury in-

struction error violated the Due Process Clause; the Court's opinion was limited to the issue of whether the instructional error announced in *Sandstrom v. Montana*, 442 U.S. 510 (1979), was subject to harmless error analysis. *Johnson*, 460 U.S. at 81 & n.10.

Second, the instructional error addressed in *Johnson* and *Sandstrom* involved an element of a crime—intent—while a *Reddick* error only prevents a jury from considering evidence of an affirmative defense. The lower court considered this distinction from *Johnson* "insignificant," stating that "[w]hat ultimately mattered in *Johnson* was that the jury could not weigh evidence that may have led to an acquittal on the charge of conviction—regardless of whether the evidence related to an element of the crime or an affirmative defense." 954 F.2d at 453 (Pet. App. 23). The *Johnson* plurality opinion, however, suggests otherwise. "An erroneous presumption *on a disputed element of the crime* renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence." 460 U.S. at 85 (emphasis added).

Indeed, the *Sandstrom* error discussed in *Johnson* violates the Due Process Clause under *Winship*, which the *Patterson* Court distinguished. *See Sandstrom*, 442 U.S. at 520-24 (relying on *Winship* to find that a presumption that relieves a state from proving intent beyond a reasonable doubt violates due process); *Patterson*, 432 U.S. at 205-11 (distinguishing *Winship*). Because the instructions at issue in *Johnson* involved an element of a crime, the Court had no reason to consider or comment upon whether the same analysis might apply if a mere affirmative defense were at issue. As explained above, the difference between an element and an affirmative defense marks the difference between state and federal constitutional law. *See supra*, pp. 15-22.

The lower court was wrong to hold, therefore, that *Boyde* and *Johnson* dictated the rule applied below. Those cases stand for the now uncontroversial proposition, first established by the cases discussed above, that jury instructions should not permit a state to obtain a conviction without proving its case beyond a reasonable doubt. Taylor's jury instructions did not violate this principle; they required the state to prove every element of the charged crime. At most, the instructions prevented Taylor's jury from accepting his lesser offense theory, which caused him no constitutional harm.

C. The Lower Court Announced a New Rule Because Other Circuit Courts Have Expressly Rejected Its Reasoning.

At least three circuits have properly rejected the reasoning that the court applied below specifically because of *Patterson* and its progeny. Many circuits have also found that the Due Process Clause does not guarantee the right to instructions on a lesser offense even if warranted by state law, a principle that necessarily conflicts with the lower court's reasoning. All these cases establish that the rule announced below is, at a minimum, "susceptible to debate among reasonable minds." *Butler*, 494 U.S. at 415 (relying on a circuit split as evidence that a rule was new under *Teague*); *see also Saffle v. Parks*, 494 U.S. at 490-91 (looking to "the large majority of federal and state courts that have rejected" a proposed rule as evidence that the proposed rule is new).

The Fourth, Sixth and Ninth Circuits have rejected the reasoning underlying the court's decision below. In *Allen v. Redman*, 858 F.2d 1194 (6th Cir. 1988), for example, the habeas petitioner argued that his state jury instruction on the affirmative defense of insanity was incorrect in that it permitted the jury to convict him of the charged crime without considering his sanity. He argued that the

instruction completely "infected" the trial so as to deprive him of due process. *See Cupp v. Naughten*, 414 U.S. 141, 147 (1973) (due process requires a new trial when "an ailing instruction by itself so infected the entire trial that the resulting conviction violates due process"). The court rejected his argument, holding that "the language from *Cupp*, stating that the 'resulting conviction violates due process,' brings the analysis . . . back to whether sanity is an element of the crimes involved." 858 F.2d at 1200. Because sanity was not an element of the charged crime, the *Cupp-Boyde* rule did not apply in the petitioner's case. *Id. See also Wood v. Marshall*, 790 F.2d 548, 551-52 (6th Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987) (confusing jury instructions on an affirmative defense to murder could not violate Due Process).

Similarly, in *Willard v. California*, 812 F.2d 461 (9th Cir. 1987), a case nearly identical to this one, the California Supreme Court had invalidated a pattern jury charge on aiding and abetting because it failed to instruct on specific intent. *Id.* at 463. In holding that the aberrant instruction nonetheless satisfied due process, the Ninth Circuit noted that "due process—independent of state law—does not require that an aiding and abetting charge contain a distinct instruction regarding specific intent." *Id.* Because due process also does not require an instruction on voluntary manslaughter, the lower court's decision in this case conflicts with *Willard*. *Accord Walker v. Endell*, 850 F.2d 470 (9th Cir.), *cert. denied*, 488 U.S. 926 & 981 (1988) (failure to give accurate charge on criminal recklessness was only an error of state law because it did not necessarily relate to an element of a crime); *Kraubert v. Goldsmith*, 791 F.2d 722, 726 n.1 (9th Cir.) (dictum), *cert. denied*, 479 U.S. 867 (1986) (even if instruction violated state law, federal habeas corpus relief only is possible for violations of federal law); *Smart v. Leeke*,

873 F.2d 1558, 1564-65 (4th Cir.) (en banc), *cert. denied*, 493 U.S. 867 (1989) (self-defense instruction could not be unconstitutionally misleading because it did not negate an element of a crime). The similarity between these cases and this one requires this Court to hold that the lower court announced a new rule.

The decision below also conflicts with the many circuit court cases that have held that the Due Process Clause does not require a state court to instruct a jury on a lesser offense when warranted by state law. See the cases cited *supra*, p. 17, n.7. In these cases, habeas petitioners alleged that state trial courts violated the Due Process Clause by not instructing a jury on a lesser offense. Federal courts typically reject these claims because "the Constitution's Due Process Clause does not require a state court to instruct the jury on lesser included offenses." *Perry v. Smith*, 810 F.2d at 1080 (citing *Easter v. Estelle*, 609 F.2d 756, 758 (5th Cir. 1980)). *Accord Bagby v. Sowders*, 894 F.2d at 797; *Valles v. Lynaugh*, 835 F.2d at 127-28; *James v. Reese*, 546 F.2d at 327 (dictum).

The instant case is indistinguishable from these lesser offense cases. At most, a *Reddick* error prevents a jury from considering whether a defendant committed the lesser offense of voluntary manslaughter as opposed to the charged offense of murder. *Falconer*, 905 F.2d at 1136. Given "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge" (*Cupp v. Naughten*, 414 U.S. at 146-47), *Reddick* errors are no different than the instructional errors in these lesser-offense cases.

The lower court's decision conflicts with many other circuit court cases. Accordingly, the court necessarily announced a new rule under *Teague*.

D. State and Federal Courts Have Disagreed Radically on the Constitutionality of the Instructions Invalidated in *Reddick*.

Since *Reddick*, federal and state courts, including the Seventh Circuit as well as the Illinois Supreme Court, have issued markedly inconsistent opinions as to whether *Reddick* errors violate the Due Process Clause. This fact, too, illustrates a dispute among reasonable jurists and, therefore, the novelty of the Seventh Circuit's decision.

Before the Seventh Circuit decided *Falconer*, many courts held that a *Reddick* error did not violate the Due Process Clause. These courts typically reasoned that, if anything, a *Reddick* error deprived a defendant of an affirmative defense and that the Due Process Clause does not guarantee defendants the right to receive an affirmative defense instruction. *See, e.g., People v. Bolden*, 181 Ill. App. 3d 481, 487-88, 536 N.E.2d 1308, 1311-12 (4th Dist.), *appeal denied*, 542 N.E.2d 116 (Ill. 1989); *People v. Taylor*, 181 Ill. App. 3d 538, 540, 536 N.E.2d 1312, 1313 (4th Dist.), *appeal denied*, 545 N.E.2d 127 (Ill. 1989); *United States ex rel. Fleming v. Gramley*, 735 F. Supp. 302, 305-08 (C.D. Ill. 1990), *rev'd sub nom. United States ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991). As the *Bolden* court explained, "No United States Supreme Court case has held that due process is denied when an imperfect instruction is given in regard to an included offense." 181 Ill. App. 3d at 487, 536 N.E.2d at 1312. These cases are consistent with the analysis presented in section B, *supra*.

Other courts, however, including the Seventh Circuit and the Illinois Supreme Court, disagreed with this reasoning. These courts held that the *Reddick* court reversed on constitutional rather than state-law grounds even though the instructions related to an affirmative defense. *See, e.g., Falconer v. Lane*, 905 F.2d at 1134 & n.5; *People v. Shields*, 143 Ill. 2d 435, 442-43, 575 N.E.2d 538, 542 (1991); *People v. Flowers*, 138 Ill. 2d 218, 235-37, 561 N.E.2d 674, 680-81 (1990); *People v. Brooks*, 175 Ill. App. 3d 136, 142, 529 N.E.2d 732, 736 (1st Dist. 1988), *appeal denied*, 124 Ill. 2d 557, 535 N.E.2d 916 (1989).

These courts either held or strongly suggested that *Reddick* itself announced a due process holding, because the *Reddick* court considered the jury instruction error to violate a defendant's alleged fundamental right to accurate jury instructions. As the *Falconer* court stated, "[a]lthough the *Reddick* Court itself did not use the magic words 'due process' as the petitioner did, the Court obviously considered the errors resulting from the invalid instructions to be of constitutional magnitude." 905 F.2d at 1134. In *Falconer*, the Seventh Circuit explicitly approved of various Illinois Appellate Court decisions, including *People v. Brooks*, which held that *Reddick* announced a constitutional rule because "[t]he right of an accused to have the State prove all the elements of his alleged crime is incontestably of constitutional dimension." *Brooks*, 175 Ill. App. 3d at 142, 529 N.E.2d at 736 (citation omitted). *See Falconer*, 905 F.2d at 1134 & n.5 (adopting *Brooks* and other Illinois Appellate Court decisions).

As the Seventh Circuit later recognized, however, "an ambiguity exist[ed] as to the precise nature of the due process violation." *United States ex rel. Fleming v. Huch*, 924 F.2d 679, 682 (7th Cir. 1991). In particular, earlier statements in the Seventh Circuit's decisions never explained why *Reddick* errors did not merely violate state law since, at most, they deprived a defendant of his state-law right to present an affirmative defense. As the Illinois Supreme Court declared in support of its decision not to apply *Reddick* retroactively on state collateral review, *Reddick*'s "conclusion did not necessarily flow from the statutory analysis" of Illinois homicide law given *Patter-*

son v. New York. People v. Flowers, 138 Ill. 2d at 240, 561 N.E.2d at 683.

Only in the decision below did the Seventh Circuit finally clarify why it believed that using these instructions violated the Constitution. The court held that constitutional error occurred because a reasonable likelihood existed that the jury might not have weighed evidence that might have supported voluntary manslaughter. 954 F.2d at 452-53 (Pet. App. 21-23).

This novel holding went far beyond the earlier, irreconcilable efforts to resolve this issue by the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and the federal district courts in Illinois. Indeed, in *Flowers v. Illinois Department of Corrections*, Judge Easterbrook charged the *Taylor* court with "abandon[ing]" *Falconer*'s holding and substituting a new one, with which he also disagreed. 962 F.2d at 709-12 (Easterbrook, J., concurring). Judge Easterbrook does not even agree that the instructions violate the Constitution. *Id.* Although some panels of the Seventh Circuit believe that *Reddick* errors violate the Due Process Clause, other reasonable jurists do not. Therefore, the lower court announced a new rule. *Butler*, 494 U.S. at 415.

In holding that it had not announced a new rule under *Teague*, the Seventh Circuit effectively declared that Judge Easterbrook's concurrence in *Flowers*, as well as earlier opinions of the Seventh Circuit, the Illinois Supreme Court, the Illinois Appellate Court and the federal district court, were products of unreasonable jurists. *Butler*, 494 U.S. at 415. This holding cannot stand. These judges did not reach divergent opinions because they were "unreasonable"; to the contrary, the opinions differ because the courts were grappling with how best to apply existing precedent, which does not squarely resolve the

constitutional question presented by these instructions. Accordingly, the lower court's decision presents a quintessentially new rule under *Teague*.

CONCLUSION

The Seventh Circuit erred on many fronts by holding that existing precedent dictated the rule that it announced below. This Court's decisions since *Patterson v. New York* (including *Boyde v. California* and *Connecticut v. Johnson*) suggest that the rule announced below is wrong. Moreover, other circuit courts have rejected the reasoning that the Seventh Circuit applied below. Finally, state and federal courts have disputed the constitutionality of instructions virtually identical to those given at Taylor's trial. For all these reasons, the lower court announced a new rule. This Court must reverse.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois

TERENCE M. MADSEN
MARK E. WILSON
MARCIA L. FRIEDL
Assistant Attorneys General

STEVEN J. ZICK
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2139

Counsel for Petitioner

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No. 91-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois

TERENCE M. MADSEN
MARK E. WILSON
MARCIA L. FRIEDL
Assistant Attorneys General

STEVEN J. ZICK
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601-3175
(312) 814-2139

Counsel for Petitioner

LAWRENCE C. MARSHALL
Counsel of Record
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603-3441
(312) 701-7355

Counsel for Respondent

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JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	*Proceeding*
March 20, 1986	Jury finds Taylor guilty of murder
February 2, 1987	Illinois Appellate Court affirms Taylor's conviction
June 4, 1987	Illinois Supreme Court denies Taylor's petition for leave to appeal
December 23, 1987	Circuit Court of Sangamon County, Illinois, denies Taylor's petition for post-conviction relief
March 13, 1989	Illinois Appellate Court affirms the denial of post-conviction relief
October 5, 1989	Illinois Supreme Court denies Taylor's petition for leave to appeal
December 19, 1990	United States District Court for the Central District of Illinois dismisses Taylor's petition for habeas corpus relief
January 21, 1992	United States Court of Appeals for the Seventh Circuit reverses the denial of habeas corpus relief

VOLUME XII

[1][1] IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
-vs-	)	No. 85-CF-536
KEVIN W. TAYLOR,	)	
Defendant.	)	

REPORT OF PROCEEDINGS of the trial before the HONORABLE SIMON L. FRIEDMAN, and a Jury, on the 18th day of March, 1986.

APPEARANCES:

THE HONORABLE J. WILLIAM ROBERTS,
State's Attorney of Sangamon County, by
MR. JOHN A. MICHELICH,
Assistant State's Attorney, for the People of the State of Illinois.

MESSRS. JOSEPH W. MILLER and DAVID K. HARRIS,
for the Defendant.

* * * * *

[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

OPENING STATEMENT FOR THE PROSECUTION

[9] * * * MR. MICHELICH: If it please the Court; counsel; ladies and gentlemen of the jury.

Now, that you have been selected and sworn as jurors in this case, I want to introduce myself to you again a bit more formally.

I am John Michelich, and I am Assistant State's Attorney here in Springfield.

It will be my duty during the course of this trial to present to you the evidence on behalf of the [10] People of the State of Illinois against the defendant Kevin Taylor, who is seated there at counsel table between his two attorneys.

The evidence will show, ladies and gentlemen, that on September 14th, 1985 at about 1:47 A.M. Joyce Taylor and her boyfriend Scot Siniscalchi were asleep in their apartment located at 2324 South Ninth Street here in Springfield when Joyce's ex-husband, the defendant in this case Kevin Taylor, broke in the door—the front door to that apartment and attacked Scot Siniscalchi with a knife stabbing him several times as he lay there in his bed.

Joyce sat there and screamed in horror as she watched her ex-husband stab her boyfriend in bed with the knife.

After Joyce ran to the phone to call police during the struggle, the defendant Kevin Taylor ripped the telephone from the wall so that she could not summon police and said something to her like, "You don't want to do that," or, "Don't do that," and then said, "I love you."

Joyce watched as Scot staggered from the bedroom into the living room bleeding profusely and as he collapsed to the floor of the living room.

[11] Joyce then ran downstairs and picked up her two-year-old daughter who had been awakened during the struggle, who was crying. Joyce took her two-year-old

daughter and ran down the stairs to get a telephone at her neighbor's apartment.

As she stood in the hallway waiting for her neighbor to answer the door, her husband--her ex-husband Kevin Taylor ran down the steps past her and out the front door of the apartment building slamming the door behind him.

While police and paramedics were on their way to the scene Scot Siniscalchi bled to death as he lay on the living room floor of the apartment.

We're here, ladies and gentlemen, because the defendant has demanded his rights under our system to a trial by jury.

During the course of this trial I will present to you the evidence of the defendant's guilt here in this courtroom, and as the defendant—or as the Judge indicated to you the witnesses you will hear will testify from the witness stand, and you will base your decision as jurors on the testimony of the witnesses that you will hear and the exhibits that will be introduced and admitted into evidence in this case.

[12] Your duties as jurors, ladies and gentlemen, the Judge has explained partially to you already during jury selection and just a moment ago before we began the trial. Your duty as jurors is not always easy, but it is a clear duty.

You will be called upon to decide the defendant's guilt based upon the evidence as I have indicated by listening to the evidence, the testimony that you will hear, and in considering exhibits that will be introduced into evidence.

It has been said that really in a criminal trial—a jury trial that there are really thirteen judges in a case, of course, Judge Friedman, who will sit in this case as judge of the law and make rulings as to the law and the rules of evidence and so forth, but there are also twelve other judges who are judges of the facts, and those twelve of

you who will retire to deliberate upon your verdict at the end of this case are also judges, judges of the facts.

Therefore, as you consider the evidence in this case, we ask for you as you bring to the courtroom all of your experiences in life that you bring with you your common sense and all of your experiences so that it will be—you'll be better able to judge what is reasonable [13] and unreasonable, what is logical and what is illogical as you hear the evidence in this case. As judges of the facts, that will be your duty.

The Judge has indicated to you the various stages of the trial.

After I am finished here with my opening statement one of the defense attorneys may have an opportunity to address you on behalf of their client.

An opening statement is an overview of the case of the evidence that you will hear. It's like a table of contents to a book possibly in which the lawyers will attempt to familiarize the jury with the evidence that they expect to be proven in the case.

Likewise, after you've heard all of the testimony the attorneys have a chance to summarize the evidence to you and to draw together through inferences based upon the evidence what the evidence has in fact shown.

Ladies and gentlemen, during jury selection you heard that the defendant faces five counts of a criminal information. The Judge read to you the title of those counts, and I want to familiarize you now with what it is that the defendant is charged with here today.

You heard that the defendant is charged with four counts of murder. Now, that, of course, does not [14] mean that he is charged with killing four different people or committing four different murders. That's not it at all.

We have this question very frequently. It simply is four alternative ways of saying the same thing.

I suppose lawyers always want to have alternative ways of saying things, and under our law there are these four alternative legal theories or legal definitions, if you will, of the offense of murder, and this defendant is charged with those four alternative legal definitions, any one of which, of course, when proven is sufficient to convict the defendant of murder. Any one or all may be found by you to apply in this case.

In Count I the defendant is charged with on the 14th of September with the offense of murder in that he, without lawful justification and with the intent to kill Scot Siniscalchi, stabbed Scot Siniscalchi with a knife thereby causing the death of Scot Siniscalchi.

The first count is based upon intent to kill the defendant—the second—or, excuse me—the victim.

The second count charges the offense of murder in that the defendant without legal justification stabbed Scot Siniscalchi with a knife, knowing that such acts would cause the death of Scot Siniscalchi, thereby [15] causing his death.

In that case and this second case it is knowing that his acts would cause death.

The third count of murder alleges that the defendant is guilty of the offense of murder in that he, without justification again, stabbed Scot Siniscalchi with a knife knowing such acts creating a strong probability of death or great bodily harm to Scot Siniscalchi, thereby causing the death.

In Count III the legal theory is knowing that there was a strong probability of death to result from multiple stab wounds.

In Count IV the defendant is charged with murder in that he, without justification while committing another forcible felony, and in this case you heard that the defendant is charged with home invasion—while committing a

forcible felony, home invasion, in violation of other Illinois statutes, he stabbed Scot Siniscalchi, thereby causing the death of Scot Siniscalchi.

In Count Number IV the offense of murder is based upon the commission of another forcible felony and the murder being committed in the process of that other forcible felony.

And, as I have said, those four murder counts [16] are merely alternative legal definitions of the offense of murder.

Count V charges that the defendant is guilty of the offense of home invasion in that he, not being a police officer acting in the line of duty, knowingly and without authority entered the dwelling of Joyce Taylor located at 2324 South Ninth Street, knowing Joyce Taylor and Scot Siniscalchi to be present within that dwelling, knowingly caused injury to Scot Siniscalchi, a person present in the dwelling, in that he stabbed Scot Siniscalchi.

Ladies and gentlemen, those are the five counts or charges which the defendant faces in this trial.

When the evidence has been completed you will be instructed by Judge Friedman as to the law which is to be applied concerning those charges.

I will present to you evidence that will show that Joyce Taylor was married to the defendant Kevin Taylor for a period of time, I believe almost two years. They became separated around Thanksgiving, during November of 1984, and no longer lived together.

Divorce papers were filed about that time, I believe, by the defendant and jointly by the—by his [17] ex-wife Joyce to get a divorce, and the divorce was final, I believe, about May of 1985.

At the time of the murder of Scot Siniscalchi, Joyce was living with Scot in her apartment at 2324 South Ninth.

Apparently, ladies and gentlemen, the fact that his ex-wife was seeing a new boyfriend caused the defendant

to be very, very jealous of his ex-wife, because on a number of occasions the defendant had threatened to do bodily harm to Scot Siniscalchi, in fact had threatened to kill him on occasions prior to the murder. This, on these occasions, shows that the defendant expressed his intent to do bodily harm to or to kill the victim in this case, Scot Siniscalchi.

On the night of the murder Joyce and Scot went to bed early at 9:00 P.M. Joyce went to bed early because her job required her to be up and working at about four o'clock in the morning.

They went to bed a little after nine o'clock, and Joyce put her two-year-old daughter Katy to bed as well in the apartment.

While they were asleep the telephone rang at about one o'clock in the morning awakening them. Joyce answered the phone, and it was her ex-husband, the [18] defendant in this case, Kevin Taylor.

After a short conversation on the telephone Joyce told Kevin that she had to go back to bed, that she had to get up early in the morning, and she needed her sleep and terminated the conversation.

After they were asleep again the phone rang a second time, and this time Joyce asked Scot if he would please answer the phone, and he did, and it was her ex-husband again, Kevin Taylor.

This time when Scot answered it he told Kevin, please, not to call Joyce again, that they were trying to get their sleep, and the conversation again was terminated.

A short time after they had fallen asleep again after the second phone call they were awakened by a very loud bang or banging at the front door as the front door was being knocked in.

As Joyce sat up in her bed and as Scot sat up in his bed, they saw the defendant Kevin Taylor as he came through the door of the bedroom from the living room

where he had broken in the door, turned on the living room light and came into the bedroom.

Joyce, as she sat up in bed, saw her ex-husband come over, jump over her and onto Scot, and she asked [19] him, please, not to do this.

Joyce saw the knife blade in the hand of Kevin Taylor as it reflected in the light and as the defendant used it to begin to stab Scot Siniscalchi.

Scot yelled, "Don't do this, Kevin; don't do this, Kevin; you're killing me."

Joyce tried to pull Kevin off of Scot but was unsuccessful. She felt the knife brush against her skin as her ex-husband used it to stab her boyfriend.

During the struggle she ran from the bedroom to the kitchen to use the telephone, and as she was doing that, she heard Scot yell from the bedroom, "My God, the knife is in me. I can feel the knife in me."

Joyce then panicked and hesitated as she was attempting to use the phone and attempting to think of what the number to dial as she saw her boyfriend Scot stagger from the bedroom bleeding profusely, and then she saw her ex-husband come from behind Scot over to where she was and pulled the telephone from the wall, telling her, as I have said, "You don't want to do that."

Joyce then watched as Scot collapsed on the living room floor up against the couch that was in the living room as he lay there on the floor bleeding.

Joyce ran out the door, and on her way out [20] the door she looked back and she saw the defendant Kevin Taylor either kick or knee Scot in the abdomen or in the back as he was laying on the floor.

Joyce ran down the stairs with her daughter Katy, who was crying, and attempted to summon her neighbor. As she stood in the hallway by her neighbor's door before the neighbor answered her door, in the light of the hallway she saw her ex-husband again as he ran by her and

out the front door slamming the front door very hard behind him.

I will also present to you the testimony in addition to that of Joyce Taylor, who was the eyewitness to this murder, the testimony of the neighbors as to what they heard and what they saw and what they did on that night.

I will present to you the testimony of the police officers as to what they did when they arrived and what they did in investigating this murder.

You will also hear from the pathologist from the Memorial Medical Center Department of Pathology, the Southern Illinois University School of Medicine, who performed the autopsy on the body of the deceased Scot Siniscalchi, and you'll learn that Scot died of severe stab wounds, seven, deep stab wounds, to be exact, with [21] a very long knife, one of which perforated his liver causing him to bleed to death.

You will hear evidence that the defendant was arrested at his home shortly after the crime, within minutes of the crime as a matter of fact, and when he was arrested there was a cut on his arm, there were scratches on his face, and there was blood on his clothing.

You'll also hear testimony, ladies and gentlemen, from fingerprint and palm print analysts from the Springfield Police Department.

You'll hear that the defendant left his palm print on the front door of the apartment house in blood as he fled the apartment slamming the door behind him and that this palm print is the palm print of the defendant Kevin Taylor.

Ladies and gentlemen, that is your duty and that is what I will present to you as is my duty under the law, and I'm certain that after you have heard all of the evidence in this case that you will then do your duty and deliberate in this case and return the only just verdict.

* * * * *

TESTIMONY OF JOYCE TAYLOR

Direct Examination by Mr. Michelich:

* * * * *

[30] * * * Q What time did you go to bed on that night?
A It was about ten after nine.
Q This would be ten after nine P.M. on the 13th?
A Right.
Q And then after midnight it was the 14th, right?
A Right.
Q Was Scot at home that night?
A Yes—yes, he was.
Q What did he do while you were working on your work for your employer?
A He was watching TV and playing with Katy.
Q Did he go to bed when you did?
A Yes, he did.
Q And did Katy also go to bed?
A Yes.
Q Where did Katy sleep?
A On a pallet at the foot of our bed.
Q In the same room that you slept?
A Yes.
Q After you went to bed you said it was what time?
[31] A Ten after nine.
Q What happened next, Joyce?
A Uh—there was a phone call. It was a little bit before one, and I got up and I answered the phone, and it was Kevin and—.
Q Where is the telephone located in your apartment?
A In the kitchen—right inside the kitchen.
Q On which wall of the kitchen?
A Uh—the wall closest to the sofa.
Q On the side of the sofa?
A Right.
Q The phone is located right here?

A Yes, on the wall.
Q All right, go ahead.
A And I answered the phone, and—uh—Kevin said, "What are you doing?"
I said, "I'm sleeping."
Q Who was on the phone when you answered?
A Kevin Taylor.
Q Did you recognize the voice?
A Yes.
Q Did he identify himself as the defendant Kevin Taylor?
[32] A No.
Q Okay.
And when you answered the phone what did Kevin Taylor say to you?
A He said, "What are you doing?"
I said, "I'm sleeping."
He said, "Sorry for calling so late, but I was just wondering when we started Terminix," and I said—I was starting to figure it out—.
Q I'm going to ask you to speak up a little more loudly. I think the jury is having trouble hearing you.
What did he say about Terminix.
A He said he was wondering when we had started it. He was just trying to figure it out. And I said I didn't remember.
Q What time was it that the phone rang?
A It was around one, shortly before one.
Q What else did Kevin say to you?
A He—uh—asked if he could see Katy tomorrow, and I said yes. And I said, "When did you want to see her?"
He said, "It doesn't matter."
And I said, "I've got to let you go. I need to get back to bed."
And—uh—he just acted like he didn't hear me, [33] and he said—uh—"So, are you still with Scot?"

I said, "Yeah."
He said, "I didn't think you would be with him that long."
I said, "We're doing fine." And I said again I really had to go to bed, I had to get up real early to go to work.
And he said, "You're rude."
And I said, "What?"
He goes, "Forget it," and he hung up, said, "Goodbye then."
Q He hung up on you?
A He said, "Goodbye," and then he hung up.
Q Was he angry on the phone?
A He didn't seem to be.
Q Were you angry on the phone with him?
A No.
Q Did you allow him visitation—.
A Yes.
Q —with your daughter Katy?
A Yes.
Q On what frequency basis?
A Whenever he wanted her he would call.
Q About how long did this conversation last?
[34] A Uh—maybe a minute, a minute or two.
Q Did you go back to bed?
A Yes, I did.
Q Did you get back to sleep?
A Yes.
Q What happened next, Joyce?
A The phone rang again, and I kind of knew it would be him, so I asked Scot to answer the phone.
Q What time was it when the phone rang the second time? Do you know?
A It was just shortly after one.
Q How many minutes had passed, or is there any way you can tell, between the first call and the second call?
A Just a matter of minutes.

Q Did Scot get up and answer the phone?
A Yes, he did.
Q Did you hear what Scot was saying from the bedroom?
A Yes.
Q Did you stay in the bedroom?
A Yes.
Q What did you hear Scot say?
A He said, "Hello," then he said, "Just leave her [35] alone, Kevin, she's trying to sleep." And then he said it again.

And—uh—then he—he said it three times. Actually, he said, "Leave her alone. She has to get some sleep. Don't bother her," and then he hung up.
Q Did he raise his voice?
A The third time he did a little bit.
Q Did he sound angry over the phone to Kevin?
A Just kind of agitated.
Q How long did this conversation last?
A Not even a minute.
Q Did Scot then come back to bed?
A Yes, he did.
Q Were you able to get to sleep again?
A Yes.
Q Then what happened?
A Uh—we both went back to sleep, and we heard a loud noise at the door.
Q What did it sound like to you?
A Sounded like the door had been knocked in, and—uh—we both sat up in bed. Than I was—I was looking at the doorway into the bedroom, and I saw—uh—Kevin standing there, and then he stepped out into the bedroom.
[36] Q Now, there is a step down into the bedroom?
A Yes.
Q Is that from the living room to the bedroom?
A Yes.

Q On People's Exhibit 1 here is it the doorway between the living room and the bedroom you're referring to?
A Right.
Q Okay.

Now, after Scot had talked on the phone to Kevin the second time, was there a light on in the living room?
A There is a little night light.
Q Where is the night light located?
A It was next to the sofa against the wall.
Q Up here?
A Right up there, yes.
Q Is there a—in that room is there a ceiling light?
A Yes, there is.
Q Where is the switch for the ceiling light?
A Right inside the door—living room door.
Q And again on People's Exhibit 1 is it right inside the door to the apartment?
[37] A Yes.
Q On the wall closer to the bottom here of the diagram?
A No, it's—it was on—.
Q The other wall?
A Right.
Q Okay.

When you look up from your bed and you said you saw the defendant—.
A Yes.
Q —what was he doing when you first saw him?
A He just walked in—uh—walked to the bedroom door, and then he just stood there for a minute and then he walked into the room.
Q Was the light on in the living room?
A Yes, it was.
Q Had it been on when you had gone to sleep?
A Yes—no, it was off when we went to sleep.

Q It was off?
A (Nodding head up and down.)
Q Does the front door open this direction or does it open the other direction?
A This—toward this wall down here. (Indicating.)
Q Toward this wall?
[38] A Uh-huh.
Q So, actually the diagram is incorrect with regard to that, is that right?
A Yes.
Q So actually the door should hinge from this way?
A Right.
Q Because the light switch is over here?
A Right.
Q All right.
After you saw the defendant in the doorway you said he stepped down into the bedroom?
A Right.
Q Did he stand in the doorway for very long?
A No.
Q What did he do then?
A Uh—he stepped down into the bedroom and he walked over toward the bed.
Q How big is the bedroom?
A It—it wasn't a big room.
Q Not very many steps over to the bed?
A No.
Q On that night was the bed in the position it is now in the bedroom on this diagram?
[39] A Yes.
Q Against the wall?
A Yes.
Q In which position on the bed were you?
A Uh—.
Q Nearest the wall or away from the wall?
A Away from the wall.

Q Can we assume then that Scot was sleeping nearest the wall?
A Yes.
Q What happened next, Joyce?
A Uh—Kevin walked over to the bed and—uh—he started to climb onto the bed, and he motioned to me—he says, "Stay right there; don't move," and—because Scot and I were scooting away from him up against the wall. And—uh—as he was climbing onto the bed he said that, and then he reached behind him and pulled a knife out.
Q Did you see the knife?
A Yes.
Q Do you know where he brought the knife from?
A Just behind his back.
Q Could you tell how long the knife was?
A Uh—it must have been about like this, I think. (Indicating.)
[40] Q The blade you're referring to?
A Yes.
THE COURT: The witness indicated about a six-inch blade.
THE WITNESS: Yes.
MR. MICHELICH: I believe that's right, Judge.
Thank you.
Q How did he say that to you, "Just sit right there," or, "Just stay right there"?
A He was—uh—had a calm voice. He was just motioning with his hand, "Just stay there; don't move. Just stay right there."
Q Did he appear to you to know what he was doing?
A He seemed to.
Q Then what happened?
A Uh—he started to climb onto the bed, and Scot and I kept scooting away from him. And he climbed onto Scot, and Scot was saying, "No, don't do that. Please, don't do that."

And I was saying, "Kevin, no, don't do that."

And he got on top of Scot, and he had—uh—Scot had grabbed his arms to try to keep the knife away and—uh—.

Q Could you see all this from where you were?

[41] A Yes, and then they started struggling a little, and I got pinned between them somehow and—uh—I felt—I could feel the blade. It went across my hand and—.

Q You say—what do you mean by that?

A I just—while they were struggling it just sort of went across my hand.

Q Did it cut you?

A Just a top layer of skin. It didn't really cut.

Q Go on.

A Then I got—I got away from in between them, and I—uh—I tried to pull Kevin off of Scot by his shoulders, and I couldn't. So I—I crawled off the bed.

Q Did you say anything to him?

A No.

I crawled off at the foot of the bed, and I started to go into the kitchen to call the police. And right when I stepped up into the living room I heard Scot say that the knife—.

MR. MILLER: Your Honor, I'm going to object to what Scot said. It's hearsay.

THE COURT: She may answer.

MR. MICHELICH: Thank you, your Honor.

Q What did he say?

[42] A Uh—as I stepped up he said, "The knife's in me, Joyce; the knife's in me."

And I—I kept going for the phone, but I couldn't—I couldn't remember the phone number after he said that. Uh—so I went ahead—I went in there to the kitchen and I picked up the phone, and I was looking at the phone numbers—you know—the numbers on there, and I couldn't think of the main number, so I hung the phone back up.

Q Was the light still on in the living room when you crossed it to go into the kitchen?

A Yes, it was.

Q Did you turn on the light in the kitchen?

A Yes.

Uh—and then after I hung the phone back up I turned around to go back into the living room. I was going to go back into the bedroom, and I turned around and Scot was standing right there at the bedroom and living room door.

Q Now, with regard to People's Exhibit 1 is that the same door as where you say there is the step down?

A Right.

Q Okay.

And where were you standing when you saw Scot [43] come to the door?

A At the doorway to the living room and the kitchen by the—near the phone.

Q In this area?

A Right—right there.

Q All right.

Go ahead. What happened, Joyce?

A Uh—I turned around and I saw Scot standing there. He was covered with blood. And I—I started to walk over there—uh—to where he was, and Kevin came out from behind him, and we were all just—we all just stood right there. And Kevin just kind of looked at me, and I said, "Kevin, you got to go; you leave."

And he just stood there, so I turned around and I ran back to the phone, and he ran over to it and he pulled the phone cord out, and he said—he said, "You don't want to do that," and he said, "I love you."

And I—Katy was screaming, and so I turned around and I picked up Katy. She was in the living room. I ran to her and picked her up and started to run out the door. And I stopped right outside the door and I looked in, and

Scot had—uh—staggered over to the couch and fallen up against the couch.

Q With regard now to People's Exhibit Number 1 [44] was the sofa in the position it is on this diagram?

A Yes.

Q All right.

You said he collapsed. Where did he collapse?

A Near—uh—.

Q The letter "A" in—.

A Yes.

Q —which is marked on the diagram?

A Yes.

Q All right.

And is that where he was when you were going out the door here?

A Yes.

Q All right.

And as you were going out the door what did you see?

A I stopped and I turned around, and I saw Kevin. He either kneed him or kicked him, and I started screaming, and I ran down the stairs to the—Tammy's.

Q When Kevin Taylor kicked Scot what position was Scot in?

A He was—uh—he was leaning up against the couch, and then he kind of fell off of the couch onto the floor. [45] Q What happened after he kicked or kneed Scot?

A I left the room. I don't know.

Q What happened next, Joyce?

A I ran downstairs to Tammy's apartment and I knocked on her door, and—uh—then I looked up at the stairs and I saw Kevin at the top of the stairs, and he ran down the stairs behind me and ran out the door and slammed the door behind him.

And right as he slammed the door Tammy opened up her apartment door, and she said, "What's wrong?"

And I said, "Kevin's stabbed Scot," and I took off back upstairs, and then she came up running behind me, and then her husband came out and ran upstairs with us.

Q Did you still have Katy?

A Yes, I did.

Q Did you take Katy downstairs?

A Later, yes—oh, then, yes, I did.

Q The first time you went downstairs?

A Yes.

Q Did you leave her downstairs?

A The first time, no.

Q When you got back upstairs what did you see?

A Scot was laying on the living room floor right [46] near the kitchen.

Q And now with reference again to People's Exhibit Number 1 is it at or near the spot where the letter "B" is?

A Yes.

Q On this diagram?

A Yes.

Q What did you do then, Joyce?

A I went over to Scot and I kneeled down beside him, and I was holding him, and—uh—Tammy's husband told me to get some blankets or something to put on him. So I went into the bathroom and grabbed some towels and laid on him.

Q How was he positioned on the floor?

A He was laying—he was kind of on his side but on his stomach, and he had his head straight down—had—he had one arm like this and the other one like that. (Indicating.)

Q Were you able to speak to him or was he able to speak to you?

A He didn't speak to me.

Q Did you say anything to him?

A Yes, I did.

Q What did you say to him?

[47] A - I told him—.

MR. MILLER: Now, I'm going to object to what she said to him.

THE COURT: Objection overruled.

MR. MICHELICH: Q You may answer, Joyce.

A I said to him—uh—I told him he was going to be okay, and I told him that I loved him and that I was sorry, and I just said the same things over again.

Q And then you got the towels to put on him?

A Yes.

Q What happened next?

A Tammy had run downstairs to call the police, and I saw Katy and she kept looking at him, and I—.

Q At Scot?

A Yes, so I kept turning her head away, and she would turn back to look at him, so I took her downstairs to Tammy's and she put her in her house with her little boy, and I went back upstairs to Scot.

And then—uh—short time later the police came.

* * * * *

[52] * * * Q Now, when you went to bed that night, Joyce, did you have the door locked to the apartment?

A Yes.

Q Is there any other type of locking device that you had ðn that door?

A There is three locks on it.

Q What type of locks?

A There was a chain link lock and a bolt type, and then on the door we just push it in and turn the knob.

Q Did you have the chain fastened also?

A Yes.

* * * * *

[53] * * * Q People's Exhibit Number 17, would you tell me what that is, please?

A That was mine and Scot's bed.

Q Does that picture show the wall beside the bed and also now with regard to People's Exhibit 18?

A Yes.

Q What does that show with regard to the wall?

A There is a hole in the wall.

Q Was that hole in the wall there when you went to bed that night?

A No, it wasn't.

[54] Q Do you know what caused it?

A The mere struggling.

* * * * *

[56] * * * MR. MICHELICH: Q Joyce, where were you living eight months prior to the murder in January, 1985?

A At my mother's.

Q On Calhoun as you've indicated?

A Yes.

Q At about 2:12 A.M. on that day did you call the Springfield Police?

A Yes, I did.

Q Why did you call the police?

A I was receiving phone calls from Kevin Taylor threatening me.

Q Okay.

Now, did the police arrive?

A Yes, they did.

Q How many phone calls on that night had you received from the defendant?

A Approximately seven or eight.

Q When the police officer arrived did you tell him about these calls?

A Yes, I did.

[57] Q Did you receive another phone call while the police officer was there?

A Yes, I did.

Q Did you answer the phone?

A Yes.

Q What did the police officer do?

A He went to the phone in the bedroom and listened to the conversation.

Q On an extension?

A Yes.

Q Who was it that called you while the police officer was there?

A Kevin Taylor.

Q Did you recognize his voice?

A Yes, I did.

Q During the conversation did he mention the defendant—or the victim, Scot Siniscalchi?

A Yes, he did.

Q What did he say about Scot?

A He said that he was going to kill him.

Q Do you remember the defendant's exact words?

A He said someday he was going to get him. He was going to kill him someday.

Q Did the police—was the police officer on the [58] other extension when he made that statement?

A Yes, he was.

* * * * *

Cross Examination by Mr. Miller:

Q Mrs. Taylor, before—before break you testified concerning a telephone conversation or conversations you had with Kevin January 15th, 1985, is that correct?

A Yes.

Q And that was approximately eight months before the incident you testified earlier about—.

A Right.

[59] Q —involving Scot and Kevin, is that correct?

A Right—yes.

Q Now, in the eight months that came between that telephone conversation you reported and the night of this incident you've talked about there was—there was no

physical confrontations between the two that you are aware of, was there?

A No.

Q Okay.

Now, Kevin had told you in the interim though in March that Scot had had someone—some of his friends beat him up, isn't that correct?

A Scot had had his friends beat Kevin up?

No.

Q Isn't it a fact in March of 1985 that Kevin was hospitalized for a period of time for—after suffering a beating?

A I don't know.

Q You don't know?

A (Shaking head from side to side.)

Q Now, back to this conversation in January of 1985, you said that he threatened Scot. He also threatened you, and he also threatened to kill himself, did he not?

[60] A Yes, he did.

Q Now, Kevin was upset at that time, wasn't he?

A Yes.

Q Wasn't it shortly after an incident where you had come with the police and taken Katy away from him? Wasn't that—didn't that precede this phone call by a few days?

MR. MICHELICH: Your Honor, this is irrelevant and beyond the scope of direct. I'm going to object.

THE COURT: He may inquire.

THE WITNESS: Yes.

MR. MILLER: Okay.

Q As a matter of fact, when you testified earlier that you separated from Kevin you walked out of the house leaving Katy with Kevin, isn't that correct?

A Yes.

Q In November?

A Yes, he wouldn't let me take Katy.

Q Ma'am—.
THE COURT: Just answer the question.
MR. MILLER: Q —just answer the question, please.
Isn't that correct?
A Yes.
Q Okay.
[61] And subsequent to that a few days later you came back and you reconciled with your husband, did you not?
A Yes.
Q And then approximately two or three weeks later you left him again, did you not?
A Yes.
Q And you left Katy with Kevin?
A Yes.
Q Okay.
And there was discussion about a divorce?
A Yes.
Q At that point?
A Yes.
Q You told him you wanted a divorce?
A Yes.
Q And he said, "I want divorced too," didn't he?
A Yes.
Q As a matter of fact, he went to an attorney and he filed for a divorce in December of 1984?
A Yes.
Q Okay.
So it wasn't a mutual divorce. He filed against you, isn't that correct?
[62] A Yes.
Q And the reason for that divorce was that he had seen you and Scot Siniscalchi together on a date in November of 1984?
A It wasn't really a date.
Q Well, is it not true, ma'am, that you weren't—were in an automobile with Scot kissing him when Kevin walked up to the car?

A Yes.
Q Okay.
Isn't it a fact that he had picked you up after work at McDonald's and you went to a party with him?
A No.
Q Okay.
Well, on that day when he walked up to the car and saw you embraced with Scot Siniscalchi he grabbed the door handle, did he not?
A Yes, he—.
Q And Scot put the car in drive and drug Kevin Taylor for about a block down the road, did he not?
A Yes, he did.
Q And Kevin was hurt that day, was he not?
A I think he hurt his knee.
Q And he was cut up and bruised on top of that, [63] was he not?
A I know he hurt his knee.
Q Okay.
Well, you went back and lived with him after that, did you not?
A Yes, I did.
Q You observed the bruises and the cuts all over his body from that incident, did you not?
A On his knee and his hands.
Q Okay.
And his pride was hurt, was it not?
A Yes.
Q He was upset, wasn't he?
A Yes.
Q He cared a lot for you, did he not, at that time?
A Yes, he did.
Q And he loved his daughter Katy, did he not?
A Yes.
Q Wasn't Katy the most—single most important thing in Kevin Taylor's life at that point?

MR. MICHELICH: Object, your Honor. This is beyond the competency—.

THE COURT: Objection sustained.

[64] MR. MILLER: Q Well, you've testified that Kevin kept Katy when you left the home those two times.

A Yes.

Q Kevin loved Katy, did he not?

A Yes, he did.

Q And he was a good father to her, wasn't he?

A Yes, he was.

Q A good provider?

A Yes.

Q And a doting father?

A Yes.

Q He gave her baths and he fed her and made sure that she was always clean, isn't that correct?

A Yes.

Q Now, in addition I think on direct examination from Mr. Michelich you testified that Kevin had visitation and you gave it to him?

A When he wanted it.

Q When he wanted it.

As a matter of fact, it was very important to him, isn't that correct?

A He would go sometimes weeks without calling to see her.

Q But he—he and you postured for custody fight [65] back in January of 1985, isn't that correct?

A Yes—yes.

Q And that was the background of that telephone conversation, isn't that true?

A I don't recall what that conversation started to be about.

Q You had taken the police and taken Katy, his daughter, from that trailer—from your trailer, did you not?

A She was not at the trailer.

Q Well, at a friend's?

A Right.

Q Okay.

And he could not have her back?

A Right.

Q And that upset him, and that was the—the background for that phone conversation, isn't that correct?

A Yes.

Q Okay.

As a matter of fact, during those six or seven phone calls that you said he made, that was the topic. He wanted to get his daughter back, isn't that correct?

A He was saying that he wanted us both back.

[66] Q Okay.

And he—in the matter of course of the conversation he also mentioned this threat to Scot?

A Yes.

Q Now, after this incident there was ultimately a divorce entered, was there not?

A Yes.

Q And you said it was in April of 1985?

A Yes.

Q And that was done by agreement between you and Kevin?

A Yes.

Q Isn't it true that between this January 15th conversation or phone conversations you report and in April when the divorce was granted that you and Kevin worked it out—the question of custody and the question of whether or not you two were going to be divorced?

A Yes.

Q He told you, "Enough; I'll let you go," isn't that true?

A Yes.

Q And he says, "If you want Scot, you can have Scot," isn't that correct?

A I don't recall him saying that.
[67] Q Okay.
Now, were you living with Scot during the time you were still married to Kevin?
A Yes.
Q Okay.
And that was back in January, was it not?
A Uh—.
Q Of 1985?
A I think we started living together in February.
Q In February?
Okay, two months before your divorce, isn't that correct?
A Yes.
Q And in February of 1980—1985 Scot and Kevin met and talked, did they not, on one occasion?
A (No response.)
Q Do you recall?
A Uh—the time that Scot had taken Katy over to see Kevin.
Q All right.
Scot had called Kevin and says, "I want to talk to you. I'm bringing Katy over." Isn't that correct?
A I didn't know that he had called him.
Q And Scot went to Kevin's trailer?
[68] A Yes.
Q Isn't that correct?
A Yes.
Q And they had a conversation?
A Yes.
Q And Scot said, "I want to be your friend."
A I don't know.
Q Was Scot injured after that meeting?
A No.
Q And that was in February of 1985, isn't that correct?

A Yes.
Q Now, when—let's move forward to the summer months of 1985.
Scot—or, strike that.
Kevin was living in the trailer, your marital trailer, isn't that correct?
A Yes.
Q And he would call or you would call him about seeing Katy?
A (Nodding head up and down.)
Q And you would take Katy over there?
A Yes.
Q Almost on a weekly basis, isn't that true?
[69] A Yes.
Q Sometimes more than once or twice a week?
A Uh-huh.
Q Is it not true too that many of the times that you brought Katy over there that you would spend the afternoon or part of the day with Kevin and your daughter in the trailer?
A I did once or twice.
Q Once or twice?
A (Nodding head up and down.)
Q If—or, strike that.
And during these times when you were spending this time—all this time with Kevin did you not report to him that you were having troubles with Scot? Your relationship wasn't as strong as you thought it would be?
A I would talk to him about Scot and I about troubles we were having.
Q Uh-huh—and you told him that he beat you one time or threw you in a refrigerator?
A No.
MR. MICHELICH: Objection, your Honor.
This is hearsay; calls for hearsay. It's beyond the scope of direct. It's irrelevant in this case.

THE COURT: I think he's got a right to inquire.
[70] Objection will be overruled.

MR. MILLER: Q Do you recall the question, ma'am?

A No, Scot never struck me.

Q Okay.

When—well, you talked—you talked with Kevin about wanting to leave, but you couldn't—you didn't feel that you could leave Scot, isn't that true?

A I had talked to Kevin about coming back, but I—I didn't want to leave Scot.

Q And the reason—you told Kevin the reason you didn't want to leave him is because Scot was going to go to prison—would be going to prison soon, isn't that true?

A That's not why—that's not why I would not have loved him.

Q Well, you didn't feel that you could leave him now when he was facing prison?

A That had nothing to do with it.

Q Didn't you also tell Kevin that you didn't like some of the activities involved—Scot's friends and some of the things he was involved in?

A No, I didn't like the things he was involved in.

MR. MICHELICH: Your Honor, this is—this is absolutely irrelevant and beyond the scope.

[71] THE COURT: Objection will be sustained as to this—this part of the inquiry.

MR. MILLER: All right, I'll move on, your Honor.

Q Now, when—in September—in September Scot—or, strike that—Kevin—Kevin Taylor exercised visitation quite regularly with Katy, did he not?

A Yes, he did.

Q It was your practice between you and your ex-husband that he would phone—he would phone you asking you if he could see Katy?

A I usually phoned him.

Q Okay.

Well, was it unusual that he would call you?

A He called sometimes, and it would be a while, and if he hadn't seen Katy I would call him.

Q Okay.

And—well, and on the evening in question, the September 13 and 14, that was a Friday night, was it not?

A I don't remember exactly what day it was.

Q Okay.

Well, Kevin's birthday was that Sunday, two days after or one day after this incident, isn't that true?

A Yes—yes.

[72] Q And isn't it true that when he first called you at one o'clock or after one that morning that he told you that he had celebrated his birthday that day and that he wanted to see Katy for the weekend for his birthday?

A No, he did not say that.

Q Well, would it—on your divorce paper was he not given the right to see his child on his birthday?

A I don't recall that that was written up. I don't remember.

Q Well, it was in fact his birthday, the next day or the day after, isn't that true?

A Right—yes.

Q And he told you that he was looking forward to seeing his daughter for the weekend?

A He just asked if he could have her is all he said about her.

Q And you talked then about Scot too, isn't that true?

A Yes.

Q And you report here on direct examination that he asked if you were still with Scot?

A Yes.

Q And isn't it true that the subject matter of that comment was that, "Has he gone to prison yet? Had [73] he left for prison yet?"

A He said, "I didn't think you'd be with him that long?
Q And the comment that, "I don't think you were going to be with him much longer," indicated that he knew that Scot was scheduled to go to prison for his criminal charges, isn't that true?
A Yes—yes.
MR. MICHELICH: Objection, your Honor.
THE COURT: Objection sustained.
MR. MICHELICH: Thank you.
MR. MILLER: Q Well, didn't that statement, "You're not going to be with him much longer," what did that refer to?
A I—.
MR. MICHELICH: Objection. She has no idea if somebody else—.
THE COURT: Objection sustained.
MR. MICHELICH: Thank you.
MR. MILLER: Q During that conversation you told Kevin that you had to work the next day, didn't you?
A Yes, I did.
Q And you told him that you wouldn't be able to bring Katy over, that Scot would have to bring Katy over, [74] isn't that true?
A I don't recall saying that.
Q Well, you couldn't have taken Katy over because you were working that day, isn't that true?
A Right, but I could have after I got off of work.
Q Well, didn't Kevin want to see his daughter on the morning and spend the whole day with her?
A He didn't say—he just said whenever—.
Q Well, if he were—strike that.
And during this conversation, Ms. Taylor, Kevin—Kevin was in good spirit, was he not?
A Yes, he was.
Q He didn't express any anger?
A No, he didn't.

Q He was civil and polite?
A Yes.
Q And sounded happy to you?
A Sounded fine.
Q And he told you that he wanted to see his daughter?
A Yes.
Q Now, on this diagram you described where the kitchen phone was. Can you see this far? Can you see it [75] this far?
A Yes.
Q And I'd like you to mark this diagram where the phone was exactly, and if you would tell me I'll mark with an "X". Okay?
A Yes.
Q Over—.
A Right about there. (Indicating.)
Q Right in there on the wall? Was it a wall phone?
A It was on the wall.
Q Okay.
Now, you slept in this bedroom back here?
A Yes.
Q Isn't that correct?
A Yes.
Q Now, can you tell the ladies and gentlemen of the jury how far in feet it was from the bedroom to that kitchen where the phone was located?
A I have no idea how many feet.
Q Was it more than twenty feet do you believe?
A I don't know how big twenty feet is.
Q Nonetheless, it was—you had to cross through two rooms to get to the phone?
[76] A Right—right.
Q Now, during this—this second conversation you report hearing Scot say three times, "She has to get her sleep"?
A Uh-huh—yes.

Q Now, do you recall talking to me and Mr. Harris and Mr. Michelich in Mr. Michelich's office on January 15th of this year?

A Yes.

Q And I asked you what you recall hearing during that day?

A Yes.

Q And do you recall also telling me you couldn't hear—all you could—but you could hear some shouting and arguing?

A I heard them saying—I heard what Scot said about that, I needed some sleep and to leave me alone.

Q And they were—they were arguing, isn't that true, on the phone?

A He was getting a little bit louder toward the latter part of the conversation.

Q Well, did you not tell me that they were arguing on the telephone?

A They had arguments back and forth.

[77] Q All right.

You also told me you didn't know what they were arguing about?

A I didn't know what Kevin was saying.

Q Isn't it true that there could have been an argument about seeing Katy that next day?

A Nothing that I heard Scot say referred to Katy.

Q You heard this over the space of two rooms in your apartment building. Is that what you're saying?

A Yes.

Q Now, you report that this conversation occurred only minutes after the initial conversation you had with Kevin?

A Yes.

Q And in that first conversation Kevin was in a good mood?

A Yes.

Q And you parted without any harsh words between you?

A Right.

Q And he was looking forward to seeing Katy?

A Yes.

Q And it's testimony that a few minutes later in a conversation with Scot that a heated angry exchange [78] occurred?

A I don't think it was that heated. It wasn't real loud.

Q Now, had Kevin ever been to your apartment before?

A No.

Q After the first phone call—the first phone conversation with Kevin do you recall if Scot said anything to you about who had called and what it was about?

A Between the two conversations?

Q Uh-huh.

A When I did come back to bed he asked who was on the telephone and—.

Q And he asked you how come you were on the phone so long, isn't that true?

A Yes.

Q And when you say that the phone conversation lasted a minute or two you could be mistaken, could you not?

A I could be.

Q It could have lasted as much as ten minutes perhaps, isn't that true?

A But it didn't.

Q Excuse me?

[79] A But it didn't.

Q And I believe you testified that the second phone conversation lasted a minute?

A Possibly.

Q And it could have taken longer than that too, isn't that—.

A It could have.

Q Back in our meeting—yours and mine and Mr. Harris and Mr. Michelich, you told me, did you not, that you didn't see what happened in that bedroom after you left?

A Right.

Q You didn't see anyone stabbing the other?

A Right.

Q Okay.

And you just left.

So you really don't know what happened after you left to call on the telephone, isn't that true?

A Right.

Q When Kevin came to your house that night isn't it true when he came into your bedroom that for the first time he realized that his daughter was sleeping on the floor on that pallet?

MR. MICHELICH: Objection, your Honor.

[80] THE COURT: Objection sustained as to—.

MR. MILLER: Q Well, had he ever seen your daughter's sleeping arrangements before?

A No, he hadn't.

Q He had never seen that she was to sleep on a pallet on the floor?

A No.

Q Okay.

Had he ever seen that before, that her bedroom where she slept was in the room with you and this man, Scot Siniscalchi?

A No.

Q And you had never told him that she didn't have a bed to sleep in or that she was sleeping in the same room at the foot of your bed?

A No.

Q Did you?

A I don't think I did.

Q Isn't it true when he came in that night that he was there to get Katy, that he reached for Katy? Isn't that true?

MR. MICHELICH: Objection, your Honor.

THE WITNESS: No.

THE COURT: Well, what she observed.

[81] You may inquire.

MR. MILLER: Q And that Scot told him to leave her alone and that he said, "I just want my daughter."

A No.

Q And that Scot was getting out of that bed and that at that point Kevin jumped on top of Scot?

A No.

Q And it was only after Kevin and Scot were wrestling did you see this knife?

A No.

Q And, ma'am, isn't it true that this happened so fast that you don't really know what happened?

A I wasn't in the room at the time that he stabbed him.

Q And then when he came—Kevin came out of that room he wanted to get his daughter and that you took his daughter from him and left?

A No.

Q When Kevin left that bedroom that evening did he have a chance to hurt you?

A Yes.

Q And he had a chance to hurt Katy, didn't he?

A Yes.

Q He went up to you and looked at you, didn't he?

[82] A Yes, he did.

Q And he had this blank look on his face?

A Yes.

Q That's what you told me?

A Yes.

Q As if he didn't know what was happening, isn't that true? Isn't that the words you used?

A I said he didn't know what to do next.

Q What to do?

A (Nodding head up and down.)
Q And he could have hurt you at that moment in time?
A Could have.
Q But he said, "I love you"?
A Yes.
Q And then he left, isn't that true?
A He didn't leave then, no.
Q Well, did he hurt you before he left?
A No, he didn't.
Q You took out of there and you went to the Cottrills'?
A Yes.
Q He could have stopped you?
A Yes.
[83] Q But he had this blank look and let you go after telling you he loved you?
A When I was leaving he was over near Scot.
Q And he saw you again at the Cottrills'—.
A Yes.
Q —door?
A (Nodding head up and down.)
Q And he went out the front door, isn't that true?
A Yes.

Redirect Examination by Mr. Michelich:

* * * * *

[92] Q With regard to People's Exhibit 1 where on the bedroom—where in the bedroom was Katy's pallet?
A Right at the foot of the bed.
Q Was it touching the foot of the bed or was it toward the wall?
A Toward the wall a little bit.
Q How far from the foot of the bed was it by your estimate?
A Maybe two foot away from the bed.

* * * * *

TESTIMONY OF JUNE PHARES

Direct Examination

* * * * *

[117] * * * Q During the summer of 1985—summer, late summer—I want you to tell me when it was that you—were you at the Cottage Inn Tavern? Did you have a conversation with the defendant?
A Yes, I did.
Q Do you remember as close as you can when it was that conversation occurred?
A It was just in the summertime. I can't remember the exact date.
Q What time of day was it?
A Probably about—between one and two in the afternoon.
Q In the afternoon?
A (Nodding head up and down.)
Q Why had you gone there?
A Just to have a couple of beers. It was on my day off.
Q And what were you doing when you went inside
[118] The Cottage Inn? What did you do?
A Just went in and sat down.
Q Who were you talking with?
A I was talking with the owner.
Q Is that Mr. and Mrs. Ford?
A Right.
Q What happened after you were seated there?
A Well, it wasn't long till Kevin Taylor walked in and he sat down beside me, and he was—he was just talking—just general talk.
Q At that time was he married to your daughter?
A No, they were divorced.
Q Were you on good terms with Kevin Taylor at that time?

A I didn't see him that much. I'd run into him once in a while at the gas station or something.

Q Did you have a conversation with him after he sat down next to you?

A Yes, I did.

Q Did that conversation concern your daughter, his ex-wife, Joyce?

A Yes, it did.

Q Did that conversation concern Scot Siniscalchi?

A Yes, it did.

[119] Q What did the defendant say about Scot Siniscalchi?

A He said that, "I'm going to get Scot someday." He said, "It might take a while but I'll get him."

Q What prompted this statement?

A Oh, we was just talking about Joyce. He said he wasn't sure that he even wanted Joyce back, and I don't—somehow he mentioned Scot. I don't—I don't remember—you know—what—why we started talking about Scot but—.

Q Is that pretty close to his exact words, or do you remember his exact words?

A That's pretty close to his exact words.

* * * * *

VOLUME XV

[1][1] IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No.: 85-CF-536
vs.	)	Before JUDGE SIMON L. FRIEDMAN (And a Jury)
KEVIN W. TAYLOR,	)	
Defendant.	)	March 19, 1986

Court convened pursuant to adjournment.

APPEARANCES:

HONORABLE J. WILLIAM ROBERTS
State's Attorney of Sangamon County, by
MR. JOHN A. MICHELICH,
Assistant State's Attorney,
for the People.

MESSRS. JOSEPH W. MILLER and
DAVID K. HARRIS,
for the Defendant.

* * * * *

[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

TESTIMONY OF JOHN MURPHY, M.D.

Direct Examination

* * * * *

[14] * * * Q Based upon your findings at the scene and your autopsy that you performed later on that day, do you have an opinion to a reasonable medical certainty as to the cause of death of Scot Siniscalchi?

A I do.

Q Will you state that opinion, please.

A The cause of death in this case was exsanguination or massive external hemorrhage due to multiple stab wounds of the body.

* * * * *

TESTIMONY OF TOMMY BAUGHMAN

Direct Examination

* * * * *

[34] * * * MR. MICHELICH: Q Now, Officer Baughman, I'm going to ask you questions concerning an incident on January 15th, 1985.

On that date were you dispatched to 407 West Calhoun here in Springfield?

A Yes, sir.

[35] Q What was the purpose of that dispatch?

A Threatening phone calls.

Q Was that also in the early morning hours?

A Yes, sir, it was.

Q When you arrived at 407 West Calhoun, with whom did you speak?

A Kevin Taylor's wife.

Q That would be Joyce Taylor?

A Joyce Taylor, right.

Q While you were speaking with her and taking your report, did she receive another phone call?

A She did.

Q Then what happened?

A She stated she had six or seven prior and figured that it might be him again.

MR. HARRIS: Your Honor, I'm going to object to what she said to this officer. It's hearsay, and I'd ask that that be stricken and ask the Court to instruct this witness to respond to the questions asked.

THE COURT: That part of the Defendant's—or the witness's statement as to what Joyce Taylor told him will be stricken, and the Jury instructed to disregard same.

Just tell us what you did, Officer.

[36] MR. MICHELICH: Q After the phone rang while you were present, what did you do?

A I picked up the extension phone.

Q Where was the extension phone?

A In the bedroom.

Q Was Joyce Taylor also on another extension?

A Yes, in the living room.

Q In the living room?

A (Nodding head up and down.)

Q Did you hear the voice of the person who had called?

A Yes, I did.

Q What did that person say?

A That person said that he was going to kill her, the baby, himself, and her boyfriend, Scot.

Q Was there any reference to Scot Siniscalchi?

A He never mentioned the last name. Joyce Taylor supplied that.

MR. MILLER: Objection, ask what Joyce said—.

THE COURT: No, that'll stand.

MR. MICHELICH: Q With regard to the reference to Scot, do you recall as best you can his exact words with regard to Scot?

A I can't remember his exact words.

[37] Q Okay, but what you've told us is what you remember as being pretty close?

A Yes, sir.

* * * * *

OPENING STATEMENT FOR THE DEFENSE

[95] THE COURT: Mr. Harris, do you care to make an opening statement?

MR. HARRIS: Yes, Your Honor, we do.

I apologize for the delay.

Ladies and gentlemen, my name is David Harris and I'm one of the two defense attorneys for Kevin Taylor.

You haven't heard much from me, or you haven't heard anything from me up until this point. However, it's at this point in these proceedings when the defense will be—will begin to present evidence to you.

That the evidence will consist of testimony from four witnesses including Kevin Taylor. My client has elected to testify, to take the stand so that you can hear directly from him.

The testimony of our other three witnesses will center around two time periods.

[96] The first period of time began during the month of November in 1984, and it was during this month that Kevin Taylor will tell you that he found his wife at that time, the mother of his child, in a car with another man and that upon seeing this sight, which was a total shock to him, that he pounded on that automobile and yelled for the occupants to stop what they were doing.

The Defendant will testify that when he attempted to open the car door, the driver of that vehicle placed the transmission into drive and sped off down the street at a high rate of speed, dragging Kevin alongside the car.

He will testify that he was injured, had a broken hand, abrasions, cuts, bruises, but perhaps more than anything, his pride was hurt.

In spite of that evening, Kevin will testify that he reconciled with his wife, Joyce, and he took her home that evening. She returned to the mobile home that evening.

Kevin will further testify, as will our other defense witnesses, that for the next month the relationship between Kevin and Joyce was an on again, off again relationship.

[97] One thing remained constant though, and that was that the baby—the daughter of Kevin and Joyce stayed with her father, Kevin, in the mobile home while Joyce left.

That first period of time, beginning in November of 1984 ended in September of 1985, and our testimony will concern many instances of confrontations, arguments, fights, problems over visitation, problems over a custody battle, problems over a pending divorce, many, many instances of confrontation and provocation between Kevin Taylor and his wife at that time, Joyce Taylor, and the victim, Scot Siniscalchi.

The final second period of time upon which we will present testimony starts at one o'clock or thereabouts on the morning of this incident, and you will hear testimony from Kevin Taylor what happened between approximately one in the morning and two in the morning.

You've heard testimony concerning phone calls that took place prior to this incident, and Mr. Taylor will testify that there were two phone calls that morning, one between he and his ex-wife Joyce concerning visitation arrangements for the daughter Katy the next morning, and the second phone call between Scot and Kevin wherein Scot refused to allow Kevin to talk to [98] his ex-wife concerning this visitation. The two men argued verbally.

And at some time during the next hour this alleged crime took place.

Those are the two periods of time that we will be asking you to consider in detail during your deliberations.

You'll hear testimony from our witnesses that Kevin and Joyce were married at a very young age, when Joyce was ejected from her house by her mother, and it was at that point in time that Kevin's life really began. He was crazy about this girl the first moment they met. He had someone to care for; he had someone to provide for, and he made sure that she finished her schooling.

They worked hard. They built a good life for themselves.

In the beginning of November of 1984 certain things happened to their lives, to their marriage, and as was told to you in the opening statement by the prosecutor, you don't leave your common sense and your life experiences in the hallway. You bring them into the courtroom with you.

And we'll be asking you to consider the [99] testimony of each of our witnesses in light of our life experiences, in light of the law that the Judge will instruct you upon, and we'll be asking you to return a verdict of not guilty on this charge of murder.

Thank you.

TESTIMONY OF RICHARD WILLIAM GILL

Direct Examination by Mr. Harris:

* * * * *

[112] * * * Q Richard, were you present at the mobile home at any other times when Joyce would call?

A I was there one day, and me and Kevin was setting there drinkin' a—I think a glass of tea or [113] something. Oh, I brought a soda with me. I didn't need anything to drink.

Q And when was that, if you remember?

A Now, this had to be—it was still cold.

Q Do you recall which year?

A It had to be about February of '85.

Q Were they separated at the time?

A Yeah.

Q And it was still cold?

A Uh-huh.

Q And what do you recall concerning Kevin's side of that conversation?

A That conversation—you know—I heard Kevin say—well, he was very angry. He says, "You mean that—that so and so has wrecked my car now too?"

MR. MICHELICH: Objection, Your Honor.

May we approach the bench?

THE COURT: Yes.

(Counsel approached the bench, and the following conversation was held at the bench between the Court and counsel outside the hearing of the Jury.)

THE COURT: I think you're going too far.

[114] MR. MICHELICH: Your Honor, I renew my objection as to hearsay.

We're now trying to prove that other acts have taken place. There was a car wreck that they're trying to get into that they're going to his state of mind.

Not everything can go to a state of mind.

THE COURT: Mr. Harris.

MR. HARRIS: The provocation, the confrontations between those two men were numerous and varied. We feel—.

THE COURT: I'm not going to make an exception to the Hearsay Rule this far down the pike.

You're objecting?

MR. MICHELICH: Yes, sir.

THE COURT: Sustained.

MR. MICHELICH: May I ask that the Jury be instructed to disregard the last comment of the witness?

THE COURT: Well, I'm going to let it stand.

* * * * *

JURY INSTRUCTION CONFERENCE

* * * * *

[119] * * * MR. HARRIS: If I may, please, we'll present evidence of cumulative provocation, the accumulation of provocation from November, 1984 until the date of the incident, and for that reason when the Defendant testifies, the Jury will be better able to understand his frame of mind on the date of the incident.

THE COURT: Objection overruled—objection sustained.

MR. HARRIS: Since most of our witnesses have similar testimony, we feel very strongly that we need to make an offer of proof outside the presence of the Jury.

[120] (The following proceedings were had in the presence of the Jury.)

THE COURT: Take the Jury, please.

(The Jury withdrew from the courtroom, and the following proceedings were had outside the presence of the Jury.)

THE COURT: Do you wish to make an offer of proof?

MR. HARRIS: Yes, we do, Your Honor.

THE COURT: Do you have any authority at all for what you're trying to do?

Now, this is an important part of your case.

MR. HARRIS: Absolutely, Judge.

THE COURT: And I assume you've researched it.

MR. HARRIS: Yes, we have.

* * * * *

[135] * * * THE COURT: A person commits the offense of murder when—.

MR. MILLER: No objection.

That's straight from the—yes, I.P.I. I've got no objection.

Issues Instruction, no objection.

* * * * *

[137] * * * THE COURT: Fifteen, 16, and 17.

Maybe we ought to wait until tomorrow on this anyway, because right now there is no manslaughter.

MR. MILLER: Yes, and she'll bring verdict forms tomorrow, Judge.

THE COURT: You'll need some testimony.

You want him charged with voluntary manslaughter. That's what you want?

MR. MILLER: Yes, at this point.

THE COURT: Why don't you hold onto them?

MR. MILLER: Just hold onto them.

THE COURT: You're going to have to have some evidence to get manslaughter in.

* * * * *

VOLUME XIII

[1][1] IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	No.: 85-CF-536
vs.	)	Before JUDGE SIMON L. FRIEDMAN (And a Jury)
KEVIN W. TAYLOR,	)	
Defendant.	)	March 20, 1986

Court convened pursuant to adjournment.

PRESENT:

THE HONORABLE J. WILLIAM ROBERTS,
State's Attorney of Sangamon County, by
MR. JOHN A. MICHELICH,
Assistant State's Attorney,
for the People.

MESSRS. JOSEPH W. MILLER and
DAVID K. HARRIS,
for the Defendant.

* * * * *

[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

[3] TESTIMONY OF RICHARD GILL (Recalled)

Direct Examination by Mr. Harris:

Q Mr. Gill, in the summer of 1985 at times when you would visit Kevin Taylor did you have an opportunity to see his interaction or his relationship—observe his relationship with his daughter?

MR. MICHELICH: Objection; irrelevant and immaterial.

THE COURT: He may answer.

[4] THE WITNESS: Yes.

MR. HARRIS: Q How would you describe for the jurors Kevin Taylor's relationship with his daughter?

A Well, him and his daughter were real close. They—uh—he took her everywhere he possibly could, everywhere he could afford to take her, and done everything he could with her.

[5] TESTIMONY OF LOUIS EDWARD LAWSON

Direct Examination

[6] * * * Q Mr. Lawson, calling your attention to September 13th, 1985, did you spend time with Kevin Taylor that day?

A Yes, I did.

Q And when did you first see Kevin that day?

A Uh—it was—uh—about 9:00, 10:00 in the morning.

Q And how did you meet him, or how did you see him that morning?

A He'd come down to my house and we had a couple of cups of coffee.

[7] Q How much time did you spend with Kevin that day?

A Most of the day.

Q Did you spend the evening together?

A Yes.

Q Was there any certain reason why you spent the evening together?

A Well, It was—uh—that weekend was his birthday, and—uh—he wanted to be with some friends—you know—party a little.

Q Who else was present with you and Kevin Taylor on the evening of September 13th?

A My wife and a cousin and his girlfriend.

Q And was Kevin with anybody?

A No.

Q What, if anything, did you and Kevin do in the afternoon hours?

A Well—uh—we went to the School Board and put in an application as janitor, and then when we come back we changed clothes and started working on his Pontiac he had.

* * * * *

[10] MR. HARRIS: Q And did you have plans for the next day?

A He did. He had a date, and then he was—well, it was a swimmin' date, and he was supposed to take his little girl with him.

Q Who was Kevin going to meet that next day, if you know?

A My wife's niece.

Q And what does she do for a living?

A She's—uh—.

Q Or what did she do for a living at that time?

A She's a life guard.

Q And where would that be, Mr. Lawson?

A Uh—it's—uh—Municipal Pool out by Washington Junior High.

Q Do you know whether or not Kevin was to exercise visitation with his daughter that day?

A He said he did.

Q Did you become intoxicated that evening?

A No.

Q Did Kevin Taylor become intoxicated that evening?

A No.

[11] Q Did you have anything to eat that evening?

A Yes, we did. We ordered a pizza from Domino's.

Q And do you recall about what time that may have been?

A 11:30, 12:00, something like that.

Q What sort of mood was Kevin Taylor in?

A Good mood.

Q Did he appear reasonable to you?

MR. MICHELICH: Objection, Your Honor; calls for a conclusion. The witness is incompetent.

THE COURT: Objection sustained.

MR. HARRIS: Did you have any arguments with Kevin Taylor that evening?

A No.

Q Did he appear to be upset for any reason?

MR. MICHELICH: Objection, Your Honor; same objection.

THE COURT: Same ruling.

MR. HARRIS: Q Did you make arrangements yourself, Mr. Lawson, to spend time with Kevin Taylor the next day?

A Uh—yes, we had—uh—planned on getting together and—uh—after he come back from his date and [12] sit around and maybe have a couple of beers, and then—uh—that Sunday we was supposed to have a roast dinner together.

Q A what?

A A roast.

Q And was Kevin planning on having his daughter for that dinner?

A Yes.

Q And would that have been his birthday?

A Yes, it would have.

* * * * *

TESTIMONY OF DEBORAH LAWSON

Direct Examination

* * * * *

[24] * * * Q And was there any special occasion for your meeting that night?

A Yeah, we were going to celebrate Kevin's birthday.

Q Okay.

And how did you celebrate his birthday?

A Uh—we just had—you know—a couple of beers at the house and talked.

Q What did you talk about?

A Oh, everything—huh—how he was going to open up a pedicure, and he was going to give me a facial and work on my hair and stuff.

Q What was Kevin doing at the time for a living. Do you recall?

[25] A Uh—he was going to school.

Q What kind of school?

A Uh—Cosmopolitan—.

Q Cosmotology school?

A Yes.

Q Here in Springfield?

A Yes.

Q How much time did you spend with Kevin that evening?

A Uh—say a good—uh—about seven—five, six, seven hours.

Q And between what hours of the day? Do you remember?

A It was about from 5:00 to 12:00.

Q Do you remember—.

A Or one— twelve-thirty.

Q You say that you drank a couple of beers together?

A Yeah.

Q Did you have anything to eat?

A Yes, we had pizza. We ordered a pizza.

Q Did anyone become intoxicated that you recall?

A No--no.

[26] Q What sort of mood was Kevin in?

A Real good mood—real good mood, because we laughed the whole night and told jokes and talked about our business that we were going to open.

* * * * *

TESTIMONY OF KEVIN WILLIAM TAYLOR

Direct Examination

* * * * *

[40] * * * Q Okay, what happened in November of 1984?

A Uh—November the 17th is when I caught my ex-wife—my wife with another man.

Q And where did that take place?

A On South Holmes.

Q Here in Springfield?

A Yes.

Q How did it come to be that you caught Joyce with another man?

A She told me that she was—.

MR. MICHELICH: Objection, Your Honor. This calls for hearsay.

THE WITNESS: —her and her friends were—.

THE COURT: Just a minute.

Objection sustained as to what she told him.

MR. HARRIS: Q Had you made arrangements to see your wife that evening or spend any time with your wife that evening?

A No.

Q What plans did Joyce have that evening?

[41] A She was going to the movies and shopping with a girlfriend of hers.

Q Did Joyce go to the movies and go shopping that you know of?

A Uh—I take it that she went to the movies, but I don't know about the shopping.

Q And when was the first time that you saw Joyce after she left home that evening?

A 2:00 in the morning.

Q Where did you see her?

A In the car with another man.

Q Had you been waiting for her to return?

A Yes.

Q What did you do, Kevin, when you saw your wife and this other man in the car?

A I started to walk toward the car, and—uh—when I got there they was kissing, so I banged on the windshield and they both turned and looked at me, and the driver put the car in gear. And as he started to pull away, I grabbed ahold of the door handle, and he drug me down the road at a high rate of speed.

Q And what happened next?

A Well, I could hear my wife telling him to stop, but he wouldn't. And finally I got my hand out [42] of the door handle and jumped off the car door.

Q Uh-huh.

Were you injured?

A Yeah, I got a bunch of scrapes and cuts on my legs and my knees, and my left hand was broke.

Q What happened then immediately after this incident?

A Uh—Joyce moved out and left my daughter and I at the trailer.

Q Did she move out that evening?

A No—uh—I took her home, and we talked, and I thought we had worked the problems out.

Q What happened next in your relationship with your wife?

A Uh—she moved out.

Q And when would this have been?

A About five days after I caught her with this other man.

Q So we're talking still November of 1984?

A Yes.

Q Okay.

Were you still employed at Simplex at this time?

A No, I got laid off and—uh—on the 2nd of [43] November.

Q So you were unemployed at this time?

A Yes.

Q How were you supporting your family?

A I was getting unemployment.

Q What happened next in your relationship with your wife, Kevin?

A Well, she was gone a few days, and—uh—then she moved back in and we had worked—apparently we had worked the problems out, and she stayed at the trailer with us.

Q So you reconciled?

A Yes.

Q What happened next?

A Well, Joyce moved out for the second time.

Q When was that?

A December the 2nd.

Q Where was your daughter?

A With me.

Q Did Joyce ever return home after she moved out the second time?

A I—no, not back with me, no.

Q Where did Joyce move? Do you know?

A Her mother's as far as I know.

[44] Q Did you attempt to reconcile with your wife again then in December of '84?

A Yes.

Q Were you successful?

A No.

Q And what did you do next?

A I filed for divorce.

Q What grounds did you allege—.

MR. MICHELICH: Objection, Your Honor. This is irrelevant.

MR. HARRIS: Q —for the divorce?

THE COURT: Objection sustained.

MR. HARRIS: Q Did you have custody of your daughter at this time?

A Yes.

Q Would Joyce see Katy during this period of time?

A Yes.

Q Now, Kevin, there has been testimony that on January 15th, 1985 that you made certain threats against your wife. Is that true?

A Yes.

Q And how did you make these threats?

A By telephone.

[45] Q And are those the conversations that Officer Baughman testified to earlier?

A Yes.

Q What was the reason for those threats?

A Well, she had taken my daughter away from me and—.

Q How had Joyce taken your daughter away from you, Kevin?

A Come to my home with—uh—the County Sheriff and got some of her clothes and took my daughter away.

Q So Joyce then had temporary custody of Katy, is that true?

A Yes.

Q Were you asking for custody of your daughter?

A Yes.

Q In these court proceedings?

A Yes.

Q Were you awarded visitation after January 15th, 1985?

A Yes, I was.

Q What sort of visitation did you enjoy?

A Every weekend, birthdays, holidays.

Q Did you exercise that visitation?

A Yes.

[46] Q How did you exercise that visitation, Kevin?

A She would call me.

Q Who was—who was "she?"

A Joyce would call me.

Q And what arrangements were made as far as transportation of your daughter?

A She or Scot would bring her over to my house.

Q Where was Joyce living at this time? Do you know?

A Somewhere on Monroe.

Q And with whom was she living? Do you know?

A Scot.

Q And where was Katy?

A With Joyce.

Q Was Joyce still working at this tin.

A Yes.

Q Were you still collecting unemployment?

A Yes.

Q Did you eventually divorce from Joyce?

A Yes.

Q When was that then?

A It was final—final in—uh—April—toward the end of April.

Q April of '85.

[47] A Yes.

Q How did you feel about that divorce?
A Not too good.
Q Did you make any attempts to reconcile with Joyce after that divorce?
A No.
Q Did you exercise visitation regularly?
A Yes.
Q How were you supporting yourself at this time?
A Unemployment.
Q Was there a chance that you'd be called back to your job?
A Yes, there was.
Q Were you called back?
A No, sir.
Q So what did you do then?
A A friend of mine said something about student loans available for cosmetology, and I decided to take up cosmetology work.
Q Was this—was this just a passing fancy or had you thought about this sort of thing in the past?
A I'd thought about it in the past.
Q And did you become enrolled in cosmetology [48] school?
A Oh, yes.
Q Where?
A Undergraduate School of Cosmetology.
Q Is that downtown here in Springfield?
A Yes.
Q And what sort of hours of classes did you attend?
A It was—uh—8:30 to 5:00—uh—.
Q How many days a week?
A Tuesday through Saturday.
Q And how long did you attend school?
A From April the 16th when I started, up to about the first week of—uh—August.

Q Now, did you have occasion to spend any time with your wife, Joyce, during this period of time, the early part of January, 1985—.
A She's come to my house on occasions.
Q Would you only see Joyce during visitation periods?
A No.
Q Would you see Joyce other than visitation?
A Oh, yes.
Q Would you visit her?
[49] A No, she'd visit me.
Q Would—would she announce her visits?
A Uh—no.
Q And what sort of things would—would you talk about with Joyce?
A Uh—that she missed me and missed seeing me and Katy together—uh—her problems with Scot.
Q Were you paying child support at this time?
A Were still working at this time?
A Yes.
Q How often would you see Joyce outside of the regular visitation periods?
A Uh—couple of times a week.
Q Would you talk to Joyce by phone?
A Oh, yes.
Q Would you call her or would she call you?
A She called me.
Q Why was that?
A I didn't know her phone number at the time.
Q What would you talk about with Joyce on the phone?
A Uh—she always called and told me that—uh—she was mixed up—uh—.
MR. MICHELICH: Objection, Your Honor. This is [50] hearsay.
THE COURT: Objection sustained as to what she told him.

MR. HARRIS: Q Was Joyce living with Scot at this time?

A Yes.

Q And was that a permanent arrangement as far as you knew?

A No.

Q Why wasn't it a permanent arrangement, if you know?

MR. MICHELICH: This calls for a conclusion.

THE COURT: Objection sustained.

MR. HARRIS: Q Kevin, you said that sometimes Scot would bring Katy to you.

A Yes.

Q Is that correct?

A Yes.

Q And about when are we talking about, what month?

A Let's see, it was May—the middle of May, June.

Q And would he drive Katy to your trailer then?

[51] A Yes.

Q Did you ever talk to Scot when he'd drop Katy off?

A Yes.

Q Did you ever argue with Scot when he would drop Katy off?

A Yes.

Q Do you remember any specific times when you and Scot would talk or argue when he was dropping your daughter off?

A Uh—the first time he dropped her off, the very first time.

Q And when was that, Kevin?

A It was in early May of '85.

Q So this was right after your divorce?

A Yes.

Q And how did it—how did it come to be that Scot was dropping Katy off and not Joyce?

A Joyce was working.

Q Did you make arrangements with Scot for him to bring Katy over?

A No, Joyce made the arrangements.

Q And how did you know about these arrangements?

A He called me.

[52] Q Do you recall what he said on the phone?

MR. MICHELICH: Objection, Your Honor; calls for hearsay.

THE COURT: Objection sustained.

MR. HARRIS: Q In the early part of May, 1985 when Scot Siniscalchi dropped your daughter off at your trailer, did you have a conversation with him at that time?

A Yes.

Q Was there anybody else present?

A No.

Q What was the subject of your conversation with Scot?

A The problems between me and my wife—my ex-wife at the time.

Q What did you talk about in particular?

A He was telling me that—uh—.

MR. MICHELICH: Objection; hearsay, Your Honor.

THE COURT: Objection sustained.

MR. HARRIS: Q Was Scot working at this time? Do you know?

A I don't think so.

Q But Joyce was working?

A Yes.

[53] Q Where would Katy spend her days when Joyce was working?

A With Scot.

Q Except on those times when you had visitation?

A Yes.

Q Now, during his visit in May of 1985 did you have any physical contact with Scot Siniscalchi?

A No, but we just argued face to face in each other's face.

Q What did you argue about?

A The problems that—uh—we was having between my wife and I—my ex-wife and I.

Q And what kind of problems were those?

A Well, they was—uh—that was talking to her—and she was talking to me about coming home and he didn't like the idea of that.

Q Had you, in fact, been discussing getting back together with your wife?

A Yes.

Q And who initiated those discussions toward getting back together?

A Joyce.

MR. MICHELICH: Your Honor, this is objectionable. I object to this as irrelevant and immaterial.

[54] THE COURT: That objection is sustained as to that line of questioning.

MR. HARRIS: Q So you didn't have any physical contact with Scot at this time?

A No.

Q Had you had any physical contact between November of 1984 when you were drug down the street and this argument that you had with Scot in May of 1985?

A At the end of May I had a little run-in with three guys at a nightclub when I got hit in the back of the head with a ball bat.

MR. MICHELICH: Your Honor, I object to this. This is irrelevant and immaterial.

There is no connection with this case whatsoever.

THE COURT: Objection sustained.

MR. HARRIS: Q Now, Kevin, you said that Joyce would call you—.

A Yes.

Q —to arrange for visitation?

A Yes.

Q Is that correct?

A (No response.)

[55] Q Did she call you for any other reasons?

A When she was upset.

Q Do you recall any specific times when Joyce would have called you concerning issues other than visitation?

A She called me from work one day crying.

Q Do you remember when that was?

A I believe it was in July.

Q July of '85?

A Yes.

Q Why was Joyce upset, if you know?

A Her and Scot was having problems.

Q What kind of problems?

MR. MICHELICH: Your Honor, this calls for hearsay again.

THE COURT: Objection sustained.

MR. HARRIS: Q Did you meet with Joyce after that phone call?

A No.

Q Did you discuss getting back together with Joyce during that phone call?

A She said she missed me and—.

MR. MICHELICH: Objection, Your Honor; calls for hearsay.

[56] THE COURT: Don't tell what she said.

MR. HARRIS: May I have one second, please, Your Honor.

Q Kevin, during the summer of 1985 how often would you exercise visitation?

A Every chance I had.

Q Every weekend?

A Yes.

Q Did you see Katy at all during the week?

A No.

Q And the visitation was always set up by Joyce calling you?

A Yes.

Q Now, when Joyce would visit you without Katy, what was the purpose of your getting together?

MR. MICHELICH: Objection; this is irrelevant, immaterial, nothing to do with this case, calls for hearsay.

THE COURT: Are you going to connect this up some way?

MR. HARRIS: Yes, Your Honor, we will.

THE COURT: You may proceed.

MR. HARRIS: Q What was the purpose of your getting together with Joyce in July of 1985?

[57] A Her problems that she was having.

Q Did you discuss reconciling?

A At some time, yes.

Q Make any arrangements to get back together?

MR. MICHELICH: Your Honor, objection. This calls for hearsay.

THE COURT: Objection sustained.

MR. HARRIS: Q Kevin, did your visitation go smoothly during the summer of 1985?

A Yes.

Q Did you always get Katy when you were supposed to?

A Yes.

Q How often would you see Scot Siniscalchi during the summer of '85?

A On occasion when he dropped my daughter off.

Q Did you ever see him when he wouldn't drop Katy off?

A Yes.

Q When was that?

A August—during the month of August.

Q Okay.

And how do you know it was August?

A Uh—it was during the fair.

[58] Q Okay.

And how was it that you came to see Scot during the fair last August?

A Uh—he was working at a stand at the fair and I was working at the fair also.

Q Okay.

Did you have any conversation with him?

A No.

Q What would be the nature of your—your seeing Scot or your contact with Scot at that time?

A Uh—I was—my job calls for me to go all over the grounds, and—uh—every time I'd come by where he was workin'—uh—he would point at me, laugh, and give me the finger.

MR. MICHELICH: Your Honor, I'm going to object. This does call for hearsay, although it's a behavioral type.

THE COURT: This is observation. He can tell what he observed.

MR. MICHELICH: Thank you.

MR. HARRIS: Q You say Scot would laugh at you?

A Yes.

Q What else did you observe?

A He'd point at me and give me the finger.

[59] Q Did you—did you ever confront him about this?

A No.

Q And for how long a period of time did this take place?

A Ten days.

Q Now, why was it that you were working at the fair at this time?

A To make some extra money.

Q So you were not going to school at that time?

A No.

Q Had you graduated from cosmetology school?
A No.
Q Were you going to start school again after the fair?
A Yes.
Q Kevin, you remember September 13th, 1985?
A Yes.
Q How did that day start?
A Smooth.
Q What did you do?
A Uh—the first thing in the morning I got up and went to Louie's house for coffee.
Q Is that Louie Lawson?
[60] A Yes.
Q What'd you do next?
A Well, about one o'clock we went out and put applications in at the 186 School District.
Q Did you spend most of the day with Louie?
A Yes.
Q What'd you do next?
A Worked on my Pontiac.
Q Okay.
Then after that?
A Uh—Louie went home to eat, and I went and got something to eat, and I went back to Louie's house that evening.
Q And why did you go back to Louie's house that evening?
A 'cause we was gonna get together and do some drinkin'. It was my birthday and I wanted to celebrate.
Q Did you have any arrangements made for visitation that weekend?
A Yes.
Q How much did you drink that night, Kevin?
A Six or ten beers, I guess.
Q And you played a card game?
A Yeah.

[61] Q Did you become intoxicated?
A No.
Q Did the alcohol have any effect on you?
A Yeah, I was slurring a little bit, but other than that I was doing okay.
Q Did you have plans made for the next day?
A Yeah.
Q What kind of plans did you have for the next day?
A I was supposed to be at the Municipal Pool at 9:30 to go swimming.
Q Were you supposed to meet someone there?
A Yes.
Q And who was that?
A Leslie.
Q Were you going to take Katy with you?
A Yeah.
Q And so how was it then that you would get Katy that next day?
A Either her or Scot would bring—bring Katy to me.
Q Did you eat dinner that evening?
A Yes.
Q Where was that?
[62] A I had a Burger King.
Q And later on you had a pizza with the Lawsons, is that correct?
A Yeah—yeah.
Q You remember anything in particular about the later evening hours of that night?
A Well, about quarter to—quarter to one I left and went home.
Q Okay.
Were there any harsh words exchanged?
A No.
Q How were you feeling?
A Great, very happy.
Q Were you looking forward to the next day?

A Oh, yes.
Q So you think you left Lawsons' trailer a little bit before one?
A Possibly, yes.
Q And what did you do?
A Went home, took a shower and—uh—put on some jogging clothes that I usually run around the house in, and—uh—then I called Joyce for—uh—to make arrangements for visitation.
Q And about what time was this? Do you know?
[63] A Around one, five after.
Q Wasn't that a little late to be calling Joyce for visitation?
A Well, it depends. When she works—sometimes she works until close, and that means she doesn't get home until one.
Q Have you called her in the past for visitation?
A Oh, yes—yes.
Q At that time of the day?
A Oh, yes.
Q Did you talk to Joyce?
A Yes.
Q And about how long did you talk to her?
A Ten—anywhere between ten and 15 minutes, I believe.
Q Did you make arrangements for visitation the next day?
A Yes.
Q Did you discuss anything else with Joyce?
A I—uh—asked her how she's doing and things weren't going so—so good, apparently.
Q Then why was that, if you know?
MR. MICHELICH: Objection; calls for hearsay.
THE COURT: Objection sustained.
[64] MR. HARRIS: Q How did your phone conversation with Joyce end, Kevin?

A I'll talk to you tomorrow; goodbye.
Q And what arrangements did you make for Katy?
A I was to get her in the morning.
Q Where?
A At home.
Q Did your conversation with Joyce end smoothly?
A Oh, yes.
Q Did you have any harsh words with her?
A No.
Q What happened next?
A Uh—a few minutes later I remembered I had a date that next morning, so I called back to Joyce's house, and when I did I talked to Scot.
Q Did Scot answer the phone?
A Yes.
Q About how long did that conversation last?
A Five, ten minutes, I believe.
Q What did you talk about—
MR. MICHELICH: Objection; calls for hearsay.
MR. HARRIS: —with Scot?
THE COURT: Don't tell us—he said what was the nature of the conversation.
[65] MR. HARRIS: Q What was the nature of your conversation with—.
A Could I talk to my ex-wife, Joyce, concerning my visitation with Katy the next day.
Q Did you ask to speak with your ex-wife?
A Yes.
Q And what response did you get?
MR. MICHELICH: Objection; hearsay.
THE COURT: Objection sustained.
MR. HARRIS: Q Were you able to talk to Joyce?
A No.
Q Why not?
A He wouldn't let me.
MR. MICHELICH: Objection, Your Honor.

THE COURT: You may answer.

MR. HARRIS: I'm sorry, can we have the last question read?

(The last question and answer were read back by the Reporter.)

MR. HARRIS: Q Were you given any reason as to why you couldn't speak with your ex-wive?

MR. MICHELICH: Now, it calls for hearsay, Your Honor.

THE COURT: Objection sustained.

[66] MR. HARRIS: May I have one second?

Your Honor, may we approach the bench?

THE COURT: Yes.

(Counsel approached the bench, and the following conversation was held at the bench between the Court and counsel outside the hearing of the Jury.)

MR. MILLER: The objections to the phone conversations are basically hearsay. We don't believe it's hearsay, even though this witness is going to report an out of Court statement. It's not offered for—the statement is not offered for the truth of the matters asserted in this conversation, but to show the effect on this man's mental state, his feelings, what effect it had on him.

And in this case the mental state is very important. It's an issue here, so the feelings and effect on this man is why it's offered, not whether or not it's true, but what was said and its effect on him.

MR. MICHELICH: That all may be, but we don't know what his answer's going to be when asked what was said by Scot.

[67] If we knew what the answer would be, the Court could more intelligently give a ruling concerning whether it would be prejudicial. We don't know what he's about to blurt out.

That's what's troubling me.

MR. MILLER: We could make an offer of proof, Your Honor.

THE COURT: What was his answer going to be?

MR. HARRIS: Pardon me?

THE COURT: Do you know what his answer is?

MR. HARRIS: Yes, sir.

THE COURT: What?

MR. HARRIS: His answers will involve refusals—several refusals to let this man have a change in his visitation arrangement. The conversation will then begin to become obscene and heated, and it will terminate in a most heated fashion.

MR. MILLER: He's going to ask to talk to Joyce. Scot said, "It's too late; you've already talked to her."

"Let me talk to her."

"No, you're not."

"Well, it's about the visitation. I've changed my mind. I want Katy brought to the pool."

[68] "You're not going to see Katy tomorrow. If I had my way, you'll never see her or her mother."

And that's basically—.

MR. MICHELICH: Okay, that's what I was afraid of, Your Honor.

If those are going to be the answers, those are—that's beyond what is admissible under the circumstances.

I don't mind if the answer contain the fact that there was from the other person a refusal to talk with Joyce or anything like that, but what actually was said and what Mr. Miller just got through saying I think is highly improper.

MR. HARRIS: All right.

THE COURT: Go back and I'll make a ruling before the Jury.

(The following proceedings were had in the presence of the Jury.)

THE COURT: The Court's going to permit the witness to testify.

The Jury is instructed that this is an exception to the Hearsay Rule. The answers being received by this Court and Jury are not for the truth of the matters so stated, but to evidence the effect of these [69] remarks on this Defendant, but it doesn't mean that these statements are true.

MR. HARRIS: Okay.

THE COURT: You may proceed.

MR. HARRIS: Thank you very much, Your Honor.

May we have the last question?

(The last question was read back by the Reporter.)

MR. HARRIS: Q Were you given any reason as to why you could not speak with your ex-wife?

A He said she—uh—was in bed, had to work, and that's—.

Q And you had just talked to her minutes before, isn't that correct?

A Yes.

Q Did you repeat your request?

A Yes, I did.

Q What did you say?

A I said, "Scot, I need to talk to Joyce about visitation tomorrow. I need to talk to her."

He said, "No, she's got to get her sleep. Leave her alone."

Q Was that the end of your conversation?

A No, I—I told him—I said, "Okay, why don't you [70] bring Katy to the Municipal Pool tomorrow. That's where I'm going to be."

And he said he wouldn't bring her to the Municipal Pool.

Q Did he give you a reason why he wouldn't bring her?

A He said that he wasn't going to bring her anywhere to see me.

Q And what did you say?

A I told him—I said, "Well, why don't I just come over there right now and get her out of your hair? That way you and Joyce can have some time together."

Q And what did Scot say in response to that?

A He said, "Well, suit yourself, but you're not going to get her."

Q Is that the end of your conversation then with Scot?

A Well, he slammed the phone down in my ear, of course.

Q How did you feel? What were you feeling at the end of that phone conversation?

A Well, the man was trying to take the only thing I had in—had in my life away from me, my daughter, and I just couldn't let him keep my daughter away from

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[71] Q Were you still in a good mood at this time?

A Oh, yes.

MR. MICHELICH: Pardon me?

THE WITNESS: I said, "Oh, yes."

MR. HARRIS: Q You weren't angry over this phone conversation?

A Very little—very little at all.

Q What did you do next?

A I went and got in my car and drove straight over there.

Q Did you do anything between the time you hung up the phone and the time you got in the car?

A Just went straight to my car, just sped out of the trailer park.

Q Why did you speed out of the trailer park?

A I wanted to get to my ex-wife's house as soon as possible to get my daughter.

Q What was going through your mind as you were driving over there?

A The times that I had gotten my daughter on visitation and her being dirty and hadn't been taken care of—uh—the way he cared for her. It just didn't—.

MR. MICHELICH: Objection, Your Honor. This is immaterial.

[72] THE COURT: Objection sustained.

MR. HARRIS: Q How long did it take you to drive over there, Kevin?

A Just a few minutes.

Q Did you obey the speed limit?

A No.

Q Did you stop for stop signs?

A No.

Q Were you angry at this time?

A Yes.

MR. MICHELICH: Pardon?

THE WITNESS: Yes.

MR. HARRIS: Q Did you know where you were going?

A Somewhere on Ninth—Ninth Street.

Q Did you have the address?

A Yes.

Q You say it took you just a few minutes to get there?

A Yeah.

Q How fast did you drive?

A I think 60, 70 mile an hour.

Q So you were speeding across town, weren't you?

A Yeah.

Q What happened as you pulled up in front of [73] that South Ninth Street address?

A Well, pulled up and got out of the car and I had remembered I had given—gotten beat a few months prior to that.

MR. MICHELICH: Objection, Your Honor. This is immaterial.

THE COURT: He may answer. He may state that.

THE WITNESS: And I took a very serious beating and—uh—got thirty-six stitches in the back of the head.

MR. MICHELICH: Your Honor, there has been no connection with this case whatsoever.

THE COURT: Objection sustained.

MR. MICHELICH: Your Honor, I'm going to move that the Jury be instructed to disregard the answer of the witness because it was non-responsive and it contains immaterial and irrelevant matters.

THE COURT: The Jury is instructed to disregard the last remark of this witness.

MR. HARRIS: Q Kevin, as you got out of your car in front of that home on South Ninth, what were you thinking about?

A Just getting my daughter. That was the only thing that was on my mind was getting my daughter and [74] going home.

Q And was Joyce or Scot going to stand in your way?

A No.

MR. MICHELICH: Objection; incompetent.

THE COURT: Objection sustained.

MR. HARRIS: Q Did you take a weapon with you?

A Yes, there was a knife laying in the seat of my car.

Q What kind of knife?

A A huntin' knife.

Q Was it unprotected?

A No, it had a sheath—sheath to it.

Q That's a holder for it, in other words?

A Yes.

Q What did you do with the knife, Kevin?

A I stuck it in my side of my sweat pants, my left side.

Q And what did you do next?

A I went into the apartment building, looked at the mailbox and found what apartment they was in.

Q And what did you do next?

A I went upstairs to the apartment, Apartment 2, and—uh—I beat on the door once, and I could hear my [75] daughter crying. I beat on the door again, and I still didn't get no answer, so I stepped back from the door and kicked it open.

Q Were there lights on inside this apartment?

A Not that I could tell.

Q What did you do next?

A I followed my daughter's cry into the bedroom and—uh—.

Q Did you hear any other noises beside Katy?

A Just some voices in there also.

Q Did you know where you were going?

A Not for sure, no.

Q What happened, Kevin?

A (Witness crying.)

Q What happened as you got close to the bedroom?

A (Witness crying.) Come to the doorway of the bedroom and—uh—Scot and Joyce were setting up in bed, and my daughter was setting on the floor on a pallet crying.

Q Who was sitting on the floor?

A My daughter Katy.

Q And Scot and Joyce were in bed?

A Yes.

[76] Q What happened next?

A I looked at—I looked at and told them I didn't want no trouble; I just wanted my daughter.

Q Was there anything in your hands?

A No, I had my hands out. I didn't want no trouble.

Q What happened next?

A I stepped down in the bedroom and went toward my daughter, and then Joyce started comin' toward me, and I told her, "Stay there, don't even move." And then

I started to pick up my daughter, and then Scot started to roll out of bed and looked like he was reaching for something—I don't know—but that's when I jumped on him.

Q And where was Joyce then?

A She was grabbing my shoulders from behind.

Q And did you fight?

A Yes, we was fightin' on the bed.

Q And what happened next?

A Well, Joyce was pulling me backwards; Scot was pulling me forwards, and finally they threw me into the wall and I hit my head, and then that's when I grabbed the knife.

Q Where were Scot's hands?

[77] A He was pulling my hair and pulling my shirt and everything.

Q Where was Joyce?

A I don't know. She—she was gone; she left.

Q How long did you fight with Scot?

A He still struggled for a little bit and I stabbed him.

Q What do you remember next?

A I just got up and walked into the kitchen, and I had blood all over me and I still had the knife in my hand, and I just looked at Joyce—I just wanted to ask her for help. I just couldn't say nothing.

Q Where was Katy?

A She got up and was walking into the kitchen toward me, and I had to get out of her way and let Joyce pick her up.

Q Was Katy coming towards you?

A Yes—yes, she was.

Q What did you do next?

A Just ran to my car.

Q What did you do with the knife?

A I don't know. I think I threw it out on the way home. I'm not for sure.

Q What did you do with the sheath?
[78] A Threw it out with the knife.
Q What did you do next?
A Well, when I got home I noticed I had a cut on my right arm. It was bleeding a little bit, not bad, so I called 911—911 for assistance.
Q Did you call anybody else?
A Louie—called Louie.
Q You were arrested a short time after that, weren't you?
A Yes.
Q You gave a statement to the police, didn't you?
A Yeah.
Q What did your statement say?
A I said that—I spent time at Lawson's earlier that day, and—uh—and I had cut myself with a knife at home.
Q Did you admit to being in that apartment on South Ninth?
A No, I couldn't—I couldn't admit it.
MR. HARRIS: One moment.
We have no further questions at this time, Judge.
THE COURT: Let's take a recess before cross examination.
[79] Dorothy, take the Jury until ten after eleven.
(A short recess was taken.)
THE COURT: Court's reconvened.
Mr. Michelich, you may cross examine.
MR. MICHELICH: Thank you, Your Honor.

Cross Examination by Mr. Michelich:

Q Mr. Taylor, you didn't ever tell this story that you told this Jury to the police, did you?
A No.
Q In fact, you gave them a quite lengthy statement on the night that they arrested you, didn't you?
A Yes, I did.

Q And the statement you gave to the police was not true, was it?
A No, it was not.
Q When did you first decide that this would be your testimony, Mr. Taylor?
A Couple of months ago.
Q While you were in County Jail?
A Yes.
Q After conversations with your lawyers?
A Yes, sir.
Q Because until then your story was contained in [80] the statement you had given to the police, wasn't it?
A Yes, sir.
Q Which was a lie, wasn't it, Mr. Taylor?
A Yes, it was.
Q Other than your lawyers and Ray Good, had you ever told this story to anybody before you took the stand today?
A No, sir.
Q You did tell Ray Good, didn't you?
A No, sir.
Q Didn't tell him anything?
A No, sir.
Q You told him about the knife though, didn't you?
A No, sir.
Q What he says though was true, wasn't it?
A No, sir.
Q Pretty close to what you said, isn't it?
A No, sir.
Q Well, anyway it's now your claim that you went over there just to see your daughter?
A To get my daughter.
Q At 1:45 in the morning, is that right?
A Yes, sir.
[81] Q Isn't it true, Mr. Taylor, that you intended to Kill [sic] Scot Siniscalchi when you went over there?

A No, sir.
Q That's why you went there, isn't it, sir?
A No, sir.
Q Well, you told your lawyer that on the way over there in the car you became angry as you sped across town to this apartment?
A Yes, sir.
Q That's when you intended to kill Scot Siniscalchi, wasn't it?
A No, sir.
Q You had the knife in your car, right?
A Yes, it was in my car.
Q And you took that with you when you went into the apartment?
A Yes, sir.
Q Intending to use it, didn't you?
A No, sir.
Q Well, your lawyer asked you questions about the phone call on January 15th to Joyce.
A Yes, sir—yes.
Q And you admitted that you had threatened her. You also threatened Scot, didn't you?
[82] A Yes.
Q On that day?
A Yes, sir.
Q And you threatened to kill him on January 15th, 1985, didn't you, Mr. Taylor?
A Possibly, yes.
Q And I believe you told your lawyer that on one occasion when Scot brought Katy over to let her have visitation with you that you had an argument with Scot, didn't you?
A Yes.
Q And you said, "We were arguing face to face?"
A Yes.
Q A heated argument?

A Yes.
Q And that's also when you intended to kill Scot Sinicalchi?
A No, sir.
Q You formed the intent because you didn't like Scot, did you?
A No, sir.
Q And that was in the summer of '85, right?
A Yes, sir.
Q Later on in the summer of '85 you said that [83] while you were at the fair Scot gave you the finger?
A Yes, sir.
Q And laughed at you?
A Yes, sir.
Q Was Mr. Harris right in his opening statement when he said that this hurt your pride?
A Yes, sir.
Q Was he right when he said that you were jealous of Scot?
A No, sir.
Q So your pride was injured, but you weren't jealous of him?
A No, sir.
Q Well, Mr. Taylor, you told the Jury that you went over there because he had the only thing that was important to you.
A Yes, sir.
Q You were jealous, weren't you, Mr. Taylor?
A No, sir.
Q This man was living with your ex-wife—.
A Yes, sir.
Q —who you said you loved?
A Yes, sir.
Q And you were jealous, weren't you, Mr. Taylor?
[84] A No, sir.

Q Well, after the incident at the fair, not only was your pride hurt, you hated Scot Siniscalchi, didn't you?
A No, sir.
Q You didn't like him, did you?
A Yes, sir, I didn't like him.
Q He made you mad, didn't he?
A Yes, sir, he made me mad.
Q He made you mad enough at least in January because you had threatened to kill him. He had made you mad enough during the argument that you had when he brought Katy over because you got right up in his face, and he made you mad then, didn't he?
A Yes, sir.
Q And he made you mad at the fair, didn't he?
A Yes, sir.
Q In fact, he made you mad enough that you threatened his life when you were speaking with Joyce Taylor's mother at the Cottage Inn, isn't that also true?
A No, sir.
Q You did threaten his life, didn't you?
A No, sir.
[85] Q Well, you had on January 15th.
A Yes, sir.
Q And you hated him even more during the summer of '85 after the fair, didn't you, Mr. Taylor?
A No, sir.
Q You hated him just the same?
A Yes, sir.
Q Your hatred didn't grow over time?
A No, sir.
Q You just kept on hating him the same, is that right?
A Yes, sir.
Q Now, on the night in question or the early morning hours of September 14th you still hated him, didn't you?
A Yes, sir.

Q And when you talked with him on the phone he made you madder, didn't he?
A He made me upset, yes.
Q You told your lawyer that you were very upset as a result of that, right?
A Possibly, yes.
Q Possibly?
A (No response.)
[86] Q Your pride was hurt?
A Yes.
Q You hated Scot Siniscalchi?
A Yes.
Q This hatred you had had for him for many months, and you were jealous of him then, weren't you, Mr. Taylor?
A No, sir.
Q Well, you did say that he had the only things that were important to you. He was living with the woman you loved.
A That wasn't the only thing important to me.
Q And your daughter.
A My daughter was the most important thing in my life.
Q So since she's so important, you decided to go and get her, is that right?
A Yes, sir.
Q At that hour of the morning?
A Yes, sir.
Q And you decided that the best thing to do would be to just go right in the apartment and take her, is that it?
A I knocked on the door twice first.
Q Uh-huh.
[87] But then you kicked it in, didn't you?
A Yes, sir.

Q You didn't take the police with you over there that night, did you?
A No, sir.
Q In fact, you didn't park in front of the apartment house, did you?
A No, sir.
Q You parked down the street, right?
A Yes, sir.
Q When you went into the bedroom you saw your daughter in there and you saw a man that you hated, didn't you?
A Yes, sir.
Q And you told the Jury that Joyce was in bed with Scot and that you went over and you jumped up on top of him in bed and struggled with him, right?
A Not at first.
Q Pardon?
A Not at first, no.
Q Oh, what did you say, "Good morning?"
A No.
Q And you had brought that nine-inch butcher knife with you, right?
[88] A No, sir.
Q It was a hunting knife?
A Yes, it was a hunting knife.
Q Pretty good sized knife, right?
A Yes, sir.
Q How long was the blade, at least six inches, wasn't it?
A At least.
Q A large hunting knife?
A Yes, sir.
Q The kind that fits in a sheath?
A Yes, sir.
Q And you put that in your pants, right?
A Yes, sir.

Q And that's where you pulled the knife from, isn't it?
A Yes, sir.
Q And you had that knife in your hand when you went on top of the bed?
A No, sir.
Q When you stabbed the man that you hated, didn't you?
A No.
Q You pulled it from your pants, didn't you?
[89] A Yes, sir.
Q And you stabbed him right there in his bed, right?
A Yes, sir.
Q You stabbed him once, and then what happened?
A I don't know.
Q And you stabbed him again, and then what happened?
A I don't know.
Q And you still hated him, didn't you? In fact, you stabbed him seven times, didn't you, Mr. Taylor?
A I guess so.
Q You don't even know?
A I don't know.
Q Did you lose count?
A I didn't count.
Q You really hated him then, didn't you, Mr. Taylor?
A No, sir.
Q You didn't?
A No, sir.
Q You meant to kill him then, didn't you?
A No, sir.
Q Even though you stabbed him seven times?
[90] A Yes, sir.
Q You were so concerned about your daughter that you stabbed a man seven times to death in front of your two year old daughter, didn't you?
A Yes, sir.

Q And you were so concerned about your daughter you went over there to get her--you didn't even take her, did you?

A No, sir.

Q You left your daughter there that you were so concerned about to watch a man bleed to death, right?

A No, sir.

Q You didn't take her?

A That's right, I didn't.

Q Now, when you came out of the bedroom you saw Joyce reaching for the phone, didn't you?

A No.

Q You don't know?

A That's right, I don't remember.

Q You remember taking the knife with you?

A Yes, sir.

Q You remember kicking in the front door?

A Yes, sir.

Q You remember stabbing a man in his bed?

[91] A Yes, sir.

Q You don't remember jerking the phone from the wall?

A No, sir.

Q You remember telling your ex-wife that you loved her?

A No, but I possibly did.

Q Could have jerked the phone from the wall though, right?

A Possibly, yes.

Q Then you ran?

A Yes, sir.

Q And you ran down the street to where you had parked your car?

A Yes.

Q And you did have those dark brown sweat pants on, didn't you?

A Yes, sir.

Q And a similar top?

A Yes, sir.

Q And underneath those brown sweat pants there was a pair of white shorts, is that right?

A No, sir.

Q Did you put them on when you got home?

[92] A Yes, sir.

Q Where did you throw your bloody clothing, Mr. Taylor?

A In a trash can.

Q Where?

A I started to drive away in my car, and I seen a trash can off to the left. I stopped my car in the middle of the street and took my clothes off and put 'em in a trash can.

Q They were covered with blood, weren't they?

A Yes, sir.

Q They were evidence of a murder, weren't they?

A Yes, sir.

Q And so you decided to conceal evidence, didn't you?

A No, sir.

Q You got out of your car and you took your clothes off. Was this trash dumpster just up the street from where you just killed this man?

A It was a trash can; it wasn't a dumpster.

Q How far away from the apartment building was it?

A A block.

Q Did you drive back to your trailer without any [93] clothes, Mr. Taylor?

A Yes, sir.

Q Did you still have the murder weapon with you?

A Yes, sir.

Q Was it in the car?

A Yes, sir.

Q On the way back to the trailer what did you do with it, Mr. Taylor?

A I think I threw it out the window.

Q Do you know where you were when you threw it out the window?

A No, sir.

Q You concealed more evidence of a murder, didn't you, Mr. Taylor?

A I guess so, yes, sir.

Q And when you got back to your trailer you decided to create false evidence, didn't you, Mr. Taylor?

MR. HARRIS: Your Honor—Judge, I'm going to object at this point. I think the testimony is clear—.

MR. MILLER: It's argumentative, the questions, Your Honor.

THE COURT: He may cross examine.

MR. MICHELICH: Q You decided to create false [94] evidence, didn't you, Mr. Taylor?

A Yes, sir.

Q You took a little paring knife from your kitchen and put your own blood on it, didn't you?

A Yes, sir.

Q And you put your own blood on tennis shoes and white socks, didn't you?

A No, sir.

Q You put them on?

A No.

Q Were you wearing them?

A Yes, sir.

Q So you had shoes on but no clothes?

A Shoes, socks, and underwear.

Q So when you got back to your trailer you put a pair of white shorts on over the top of your underwear?

A Yes, sir.

Q And after you created false evidence by putting your blood on a paring knife, is that when you concocted this story about cutting your own arm?

A Yes, sir.

Q And you told Louie Lawson that you had cut yourself, didn't you?

A Yes, sir.

[95] Q And you had told the police that you had cut yourself, didn't you?

A Yes, sir.

Q That was a lie, wasn't it, Kevin?

A Yes, sir.

Q So now you had concealed two pieces of evidence of a murder, and you had created false evidence at your trailer, and then you lied to the police, isn't that about right?

A Yes, sir.

Q You never told them at all about your daughter, did you?

A No, sir.

* * * * *

JURY INSTRUCTION CONFERENCE

[98] (The following proceedings were had in chambers outside the presence and hearing of the Jury.)

THE COURT: Okay, all set?

MR. MILLER: Yes, Your Honor.

THE COURT: Defendant's Instruction Number 1.

MR. MICHELICH: I object, Your Honor.

This is IPI 7.03. It's based upon voluntary manslaughter and it is based upon sudden and intense passion resulting from serious provocation.

I don't recall any evidence whatsoever that there was serious provocation by the deceased.

Under the law if there is any time at all for the voice of reason to be heard or any cooling off period, as it is called, there can be no sudden or intense passion.

Now, yesterday they attempted to show provocation by events which occurred in May, some five months earlier. The Court ruled that that is too remote.

There has been no evidence subsequently which shows provocation at the time of the murder. In fact, all the evidence shows the opposite. The evidence shows that he became angry while at his trailer across town. He became angry because of the substance of some telephone [99] conversation with the deceased.

Words alone, even over the telephone and under those circumstances, are not sufficient, and the law is clear, I believe, that words are not sufficient to excite such a sudden or intense passion.

Even if those words were sufficient, under the law to excite such a passion there was a cooling off period as he drove across town, so the phone call can't give rise to involuntary—or to a voluntary manslaughter instruction.

When he arrived at the apartment there was no argument whatsoever. In fact, all the evidence shows that he broke in the door. He was committing a forcible felony.

He then became the aggressor, and under 7-4 of Chapter 38 an aggressor who is performing or committing a forcible felony cannot claim justification of any kind.

Here we have a person who is knocking on the door, going immediately to the bedroom and jumping on top of the victim who he stabs.

So, I can find no provocation at all in the record.

THE COURT: Mr. Miller.

MR. MILLER: Yes, Your Honor, I believe what Mr. [100] Michelich is arguing is incorrect.

I have three cases here that I'll cite to the Court where words alone were justification—or were provocation.

He is correct in the general statement of the law that ordinarily it's not, but it's not an absolute rule.

And I would cite these cases: People versus C-u-r-w-i-c-k, 33 Illinois Appellate 3d 757; People versus Newberry, 127 Illinois Appellate 2d 322; and People versus Ahlberg, A-h-l-b-e-r-g, 13 Illinois Appellate 3d 13—I'm sorry—1038.

But there is evidence in this record of provocation, and whether or not it's serious provocation that would insight intense passion in a reasonable person is a Jury question, a question of fact.

We believe there is enough evidence in this record to give that question to the Jury.

And as to the cooling off—as to the cooling off period that he alludes to, there is no magic time period.

The question whether or not if a sufficient period of time—in this case the evidence shows a few minutes—that he drove this—from his trailer to this [101] apartment in a matter of a few minutes—whether or not he'd cool off or should have cooled off is another question of fact.

And I cite People versus Hudson, H-u-d-s-o-n, 71 Illinois Appellate 3d 504, in support of that proposition.

We believe the record does have enough evidence in it to create a question of fact that would allow this instruction, and we think it's a Jury question.

THE COURT: You want to say anything else?

MR. MICHELICH: Other than the threshold question is not a question of fact; it's a question of law in order to get the instruction to the jury. And I believe under the evidence of this case it is simply not based upon any evidence that shows any provocation at the time of the killing.

THE COURT: Well, serious provocation, as the instruction indicates, is conduct sufficient to excite a reasonable person.

The Court's going to let the Jury decide what—what is a reasonable person, whether that provocation existed here or did not exist here.

The Court's going to give the instruction over the objection of the State's Attorney.

[102] You have the same objection to Defendant's Instruction Number 2?

MR. MICHELICH: Yes, sir.

MR. MILLER: Your Honor, I would point out to the Cour [sic] that I have modified that by one word.

THE COURT: What's the word?

MR. MILLER: I removed the word "the State must prove" and substituted "the evidence must prove."

Ordinarily, I think the manslaughter may be offered by the State as an alternative for a lesser included in some certain cases, but in the case here we've introduced that evidence showing the provocation, so I think that so the Jury is not confused that that substitution should be made.

THE COURT: It will be given as tendered.

Now, I have a verdict form here—four verdict forms. Is that—is that how many verdict forms there are?

MR. MICHELICH: If the Court gives the—.

THE COURT: There are six of them.

MR. MILLER: There are six of them.

MR. MICHELICH: There should be if you give the voluntary.

[103] MR. MILLER: I didn't bring one with six.

MR. MICHELICH: I believe that one word should be changed.

THE COURT: Is that the only place it appears, six?

It will be given as tendered.

I've got not guilty of the offense of murder, not guilty of the offense of home invasion, guilty of the offense of murder, guilty of the offense of home invasion, not guilty of the offense of manslaughter and guilty.

I find an instruction here—.

MR. MILLER: Yes, that's Number 5.

THE COURT: Did you just hand me that?

MR. MILLER: Yes, I just did.

THE COURT: Have you seen it?

MR. MICHELICH: Yes, I believe it's the same one I offered.

MR. MILLER: Did you offer it?

MR. MICHELICH: Having to do with a witness' conviction?

THE COURT: You gave that, didn't you?

MR. MICHELICH: 3.12 of IPI.

MR. MILLER: I'll withdraw it.

[104] THE COURT: Okay.

Do you fellows want to be timed on your arguments?

MR. MICHELICH: I don't care, Judge. I don't demand any limitation.

I would like to know if they intend to split up their time. It doesn't make any difference really but—.

THE COURT: Are you going to split yours?

MR. MILLER: No, we're not.

THE COURT: Who is going to argue?

MR. HARRIS: I am.

MR. MILLER: David.

THE COURT: I had one criticism from the Jury. They couldn't hear you at times, so in your argument if you'll project your voice a little bit.

MR. HARRIS: Very good.

(A short recess was taken.)

MR. MICHELICH: Judge, I asked for a moment to find a specific case because of the current state of the law in Illinois regarding murder and manslaughter. Right now it's up in the air because of the decision of the Fourth District in People versus Bolden.

I realize the Court has a duty to give the [105] Defendant a fair trial, which I want as well, because I don't want to have problems on appeal.

I would ask the Court to reconsider the grant of the instruction of manslaughter in this case. I don't believe, Judge, that under any circumstances the denial of a manslaughter instruction here would be cause for reversible error, and I say that because all of the cases that I have found require a sudden or intense passion.

Your Honor stated that the reason you wanted the Jury to decide was to determine whether it was a passion in a reasonable man. I don't dispute that. What I do dispute is the legal grounds for allowing the Jury to make that factual determination.

The legal grounds are that it was a sudden passion. The facts of this case show that there was no sudden passion at all, and so I don't think the legal grounds exist to allow the Jury to determine whether the provocation would be such that it would excite a passion in a reasonable man.

My point in urging the Court to rule out the Jury instruction tendered is because of the confusion that it would create in the mind of the Jury.

Under People versus Bolden, the Appellate [106] Defender claimed on appeal that the law of Illinois does not provide for manslaughter as a lesser included offense of murder, because in manslaughter there is one additional element.

Ordinarily, where there is a lesser included offense, the lesser included offense has one less element or something like that—fewer elements than the greater offense. But under our law since 1961 when we eliminated malice aforethought we changed that to intent, and murder requires intent.

Manslaughter requires intent, but in the two types of manslaughter an additional element, the first being that there was a belief that there was a danger and that be-

lief was unreasonable, the self-defense situation and the situation here, the second time where the Defendant claimed provocation.

So in People versus Bolden which I argued in the Appellate Court—the decision in that case was issued by Justice Webber who stated that they're really not sure that manslaughter is a lesser included offense in Illinois of either kind, and it was their holding in the Bolden case that the State must negate the elements of voluntary manslaughter in the murder charge such that in our instruction for murder we have to add another element. [107] In this case we would have to add that the Defendant was not under a sudden or intense passion resulting from serious provocation. That requires the State to negate that.

The elements of murder so far are twofold. First, that the Defendant did the act, and, second, that he had the intent to do the act in one of the four alternative ways.

But under Bolden they're holding or seemed to hold that now if the Court gives the Jury an instruction as to voluntary manslaughter we have to add another element in the murder instruction that requires the State to negate the form of voluntary manslaughter tendered.

While there is language in Bolden which says that voluntary manslaughter of a sudden and intense passion is an included offense of murder, they have cited People versus March (phonetic) and People versus Hoffer (phonetic). They have in part overruled People versus March, and the state of the law in this area is confusing, to say the least.

We have appealed the Bolden decision to the Supreme Court, and I don't believe it's been argued there yet. [108] My next point, Your Honor, is that where we have—since the Bolden case where we have confronted this problem we have asked the Court—and the Court on one occasion—I believe Judge Cavanaugh has given another in-

struction which is not an IPI instruction, and in that instruction it attempts to straighten out for the Jury whether or not they are to reach a verdict as to both murder and manslaughter.

As the Court is aware, if they found him guilty of murder but not guilty of voluntary manslaughter, the verdict might be contradictary. [sic]

And rather than allowing the lawyers to have a crack at explaining the law, this complex law during closing argument, we have offered an instruction to this effect: That the Defendant is charged with both murder and manslaughter. If you find the Defendant guilty, you must find him guilty of either offense, not both. But, on the other hand, if you find him not guilty, you can find him not guilty on either or both of the offenses, which would clarify the question in their minds.

And in past cases I've had questions from the Jury during their deliberations: Must we render a verdict as to both? And, of course, they need not render a verdict as to both.

[109] In fact, it was in the Bolden case where there was a question from the Jury while deliberating as to whether they needed to do that, and Judge Terrill responded that they may but need not.

Fortunately, they didn't, and they only found as to murder.

My reason for going through all this here, Judge, is that I believe it unduly complicates this case. It requires us now to completely redo the murder instructions if, in fact, Your Honor, would hold that Bolden is applicable.

I'm not even sure it is.

The Bolden opinion is very long and involved and, I dare say, the reasoning convoluted in many places, and it is not yet the law in Illinois. It is simply the law in the Fourth District, and I believe that it's very difficult to say what Bolden actually stands for.

I think the Court would be on very solid ground in refusing the tendered instruction as to manslaughter, and I request the Court to reconsider not only in light of the complexities of the law but in light of the fact that there is no evidence to support it.

I would ask counsel to demonstrate what [110] evidence there is that shows a sudden and intense passion without time for the Defendant to reflect, without time for a cooling off, and without time for the voice of reason to be heard.

THE COURT: Is that the instruction that Judge Cavanaugh has given?

MR. MICHELICH: It was given in the Bilyeu case, yes.

THE COURT: Is that an original of one?

MR. MICHELICH: It says it was offered by the Defendant, and I believe in that case our office and the defense attorney—.

THE COURT: The Court has reconsidered whether or not it's going to give the manslaughter charge, and the Court's going to give the manslaughter charge. I'll give this instruction along with it.

MR. MICHELICH: Do we have to change the murder?

THE COURT: I don't think so.

I don't know what Bolden says.

MR. MICHELICH: Well, the result of Bolden was contradictory in its reasoning.

THE COURT: I'm going to give the Appellate Court another shot at it.

MR. MICHELICH: That's all right, Judge, I [111] understand your reasoning. I just don't want to knowingly create error here.

THE COURT: We're not doing it knowingly; we're doing it out of ignorance.

MR. MILLER: Is that a Court's instruction?

THE COURT: That'll be a Court's instruction, because they'll be asking that question anyway.

(The following proceedings were had in the courtroom, in the presence of the Jury.)

THE COURT: Court's reconvened.

Mr. Michelich.

MR. MICHELICH: Your Honor, the People have no evidence in rebuttal.

THE COURT: That concludes the case for both sides then?

MR. MICHELICH: Yes, Your Honor.

THE COURT: You may argue the case then.

CLOSING ARGUMENT FOR THE PROSECUTION

MR. MICHELICH: May it please the Court; counsel; ladies and gentlemen of the Jury.

First, I want to express my appreciation to you for your service as jurors in this case.

The system of justice that we have in this country, as all of us are aware, we're very proud of [112] it. It is the best system of justice that we've been able to devise in the world, and I believe that is due to the fact that we have citizen participation in our system of justice, and I want to thank you for your direct participation in that system.

We're here because in our country every Defendant charged with a crime has the right to have his case heard in a court of law before a jury of his peers, and he has a right to have his day in court.

We have provided Kevin Taylor with his day in court, and it will soon be time for you to retire and deliberate upon your verdict.

The purpose of a closing argument, as the Judge indicated earlier in the case, is for the opportunity—for the lawyers to have an opportunity to discuss the facts and circumstances of the case and to discuss with the Jury what the evidence has shown.

Each side has an opportunity to deliver a closing argument. Because the State has the burden of proof in a criminal case, I go first, and I will be followed by one of the defense lawyers, and than I will have a chance once again to address you on behalf of the People in rebuttal after the defense lawyers have had their opportunity to speak with you about the [113] case.

Ladies and gentlemen, this has not been a long or difficult case for the evidence is not that complicated, and in fact, it's a very clear-cut case.

I urge you to consider all the evidence, however, as you heard it from the witness stand and the exhibits that you have seen introduced into evidence.

And during our closing arguments—a good closing argument should do a few things to help the Jury.

First of all, it should focus on the issues of the case, that is to say, what is actually in issue in the case.

A good closing argument should also identify the elements of the offenses and address itself to how those elements have been proven and what evidence there is to support those elements, and in that way the closing arguments will assist the Jury in determining what the facts are.

You will be instructed by Judge Friedman as to what the law of the State of Illinois is and how the law is to be applied to this case.

You heard Judge Friedman tell you in Jury [114] selection that you're to follow the instructions of the Judge and apply that law to the facts of this case and thereby rendering your verdict.

You will be instructed, therefore, about the elements of the offenses that are charged here.

When I use the word "elements" I mean that is the law's way of breaking something very complex down into its parts and defining its parts.

You'll receive an instruction that these are the elements of the offenses involved.

Now, as I indicated to you in my opening statement, the first offense is the offense of murder, and you will be instructed that there are two elements to the offense of murder.

The first element is that the Defendant performed the acts which caused the death of the deceased, Scot Siniscalchi, and the second element consists of any of the four alternatives that I mentioned to you in my opening statement. Those four alternatives are different legal ways of saying the same thing.

If you find the first element to exist, that the Defendant performed the acts which caused the death, then you may pick any one or all of the four elements or the four alternatives to comprise the second element of [115] the offense of murder.

Now, the first element, as I have said, is that the Defendant performed the acts, and under the second element here are your four choices: He intended to kill or do great bodily harm, or he knew his act would cause death or great bodily harm, or he knew his acts created a strong probability of death or great bodily harm, or, fourth, he was committing the offense of home invasion.

Those are the two elements of murder, and the second element is found in any one or all four of those alternatives, so really murder is only two elements and is not as complicated as we may think it is.

The other offense is the offense of home invasion.

Home invasion is a bit more complicated, because it has four elements, and you will be instructed that home invasion contains these elements: First, that the Defendant is not a police officer.

Now, you heard that at no time in his life has he ever been a police officer.

Second, that he knowingly entered the dwelling place of another. You heard evidence that he kicked down the door to the apartment of his ex-wife and entered the [116] apartment.

The third element is that he knew that one or more persons were present inside the dwelling. Of course, he said he knew they were in there. That's why he kicked in the door. He had just talked to him on the telephone only moments before.

And the fourth element is that once he got inside, he intentionally caused injury to somebody inside the apartment, and he intentionally caused quite an injury to Scot Siniscalchi.

So, those are the four elements of the offense of home invasion.

You will be instructed that those are the elements of the offenses with which he is charged.

I have presented to you during the course of this trial all of the evidence in behalf of the People of the State of Illinois which shows that every one of those elements have been satisfied beyond a reasonable doubt.

Ladies and gentlemen, this is an overwhelming case of intent to kill. This is an overwhelming case involving deliberate premeditated hatred and murder, and all of the elements that are required to be proven have been proven overwhelmingly, not only by the State's case, [117] but by the Defendant's own testimony from the witness stand.

I want to review with you just briefly the State's evidence in this case. I don't believe any useful purpose would be served by me going through it in detail because I'm sure that you all recall exactly what the State's witnesses said.

You heard the testimony of an eye witness to this case, Joyce Taylor.

It is fortunate indeed when the State is able to provide the Jury with an eye witness to a brutal murder who

survived to tell about it, and in this case you heard the testimony of Joyce Taylor.

You heard her describe to you in graphic detail how, while she was in bed with Scot Siniscalchi, asleep a little bit before two o'clock in the morning on September 14th the door was kicked in. You heard her describe to you her horror as she saw that man come into the bedroom and jump on the bed and jump on Scot.

You heard her describe to you her horror as she saw the knife blade come from his pants where he told you he had it, and you heard her describe to you the horror as she saw him plunge the knife into her boyfriend as she got out of that bedroom to use the [118] telephone, and you heard her describe the words used by Scot Siniscalchi as he yelled, "You're killing me, Kevin; don't do this," and then as he yelled to Joyce, "My God, the knife is in me; I can feel the knife in me."

Yes indeed, it is very fortunate that we're able to provide you with an eye witness to this case, the same eye witness who saw that man come into the bedroom after he kicked in the door, who saw that man come out into the kitchen and ripped the phone from the wall to prevent her from calling for help and who saw that man run out of the apartment house, slamming the front door where he left his bloody palm print. That's the eye witness.

Without one more bit of evidence, without one more witness or piece of evidence, this case is proven overwhelmingly by the testimony of that eye witness.

We presented to you also the testimony of the neighbors who heard the ruckus, if you will, and noted the time, when they were awakened in their bed at 1:47 A.M., Jim and Tammy Cottrill.

You heard the testimony of Tim Griffin, who occupied an apartment sharing a wall with the bedroom where this murder took place, and he heard the scuffle, [119] and you

can bet that he heard it when, as you see in one of the photographs, where during the scuffle a large hole was knocked in the wall of the bedroom through the drywall, and when Tim Griffin heard that struggle in the next apartment, he got up and looked out the window when he heard the door slam, just as Joyce told us the door slammed when he went out and just as the Cottrills told us they heard their front door slam very hard, just before they got to their front door to meet Joyce Taylor. Tim Griffin also heard the front door slam as the Defendant fled from the building leaving his bloody palm print on the door.

Mr. Griffin looked out the window, and he saw the man run across the front and down the street.

And then you also heard the testimony of John Voorhees, who lived across the street and heard the dispute across the street and looked out to see the man in dark clothing, he described, run from the building.

But this doesn't really even prove much. It's more than—it's just icing on the cake, because as I have said, the eye witness proves everything in this case, and furthermore all of what I have just told you has been admitted by that man from the witness stand in front of you today.

[120] You heard testimony from the pathologist, Dr. John Murphy, as to the cause of death of Scot Siniscalchi.

Dr. Murphy went to the scene, inspected the scene, took photographs and performed the autopsy.

He testified that Scot Siniscalchi died as a result of massive bleeding. In common terms, he bled to death on the floor of the living room, due to seven stab wounds, and you saw photographs of them, the most lethal of which was the large gaping hole in the side of Scot Siniscalchi, which was so deep that it cut his liver in two.

You heard then the testimony of various police officers who investigated this case, who went to the apartment,

who took statements from witnesses, Officers Sanders and Schweska, who said they arrived at about 1:53.

And you heard testimony from Officers Baughman, Daley, and Redpath, who went right to the Defendant's trailer and placed him under arrest, and when he was placed under arrest he had scratches on his face, a cut on his arm, and blood on his clothing.

Also, you heard the testimony of Officer Baughman as to an incident which occurred some eight months prior on the 15th of January, 1985, when he [121] happened to be the officer called to the home of Joyce Taylor's mother for the complaint of threatening phone calls, and that he just happened to be there when the phone rang again, and Officer Baughman overheard the man identified to you by Joyce Taylor as the man who she had heard on the telephone when he threatened to kill Scot Siniscalchi eight months before he finally did, and finally carried out his intentions towards Scot.

You also heard the same testimony from Joyce Taylor who told you about the phone call and about the threats that she had gotten from her ex-husband.

You heard evidence of another expression of intention by that man who told June Phares, the mother of Joyce Taylor, what his intentions were during the summer when he met her and saw her at the Cottage Inn on MacArthur and Calhoun.

He told her that—and you'll recall her words—that he was going to get Scot some day or he was going to get even with Scot some day. No matter how long it took, he was going to get him some day, another expression of his state of mind and his intention to do what in fact he did on September 14th.

Then you heard the testimony of Detectives Watts and Tavenor who matched the fingerprint on the [122] door, the fingerprint—or rather the palm print in blood which was transferred on the side of the door and which you

have heard was matched by way of the latent fingerprint to the inked palm print of the Defendant.

Again, we're fortunate indeed to be able to present to you a positively identified palm print, but it's just icing on the cake, isn't it, where the Defendant has taken that stand and has admitted it to you.

You also heard the very unusual testimony from a cell mate of the Defendant while they were in the same cell block at the Sangamon County Jail, the testimony of Ray Good, who was so shocked by what he heard Kevin Taylor say that he contacted me by that letter there to volunteer the information that he had heard from the Defendant himself.

Now, the Defendant admitted it to you, ladies and gentlemen, when he testified.

It's certainly not too much to believe that he also admitted it up in the County Jail.

The one difference, however, the very chilling difference is that Ray Good told you that when he told him about what he had done, the Defendant thought it was funny and laughed about what he had done as if to brag about what a big man he is. That was not the Defendant [123] you saw on the stand today, but the Defendant admitted it, nevertheless, to Ray Good, and he told Ray Good that he took that big knife with him, that he kicked in the door, that he jumped on top of Scot Siniscalchi, and that he stabbed him to death.

And Ray Good volunteered that information. Ray Good, while a convicted felon, may be a burglar, but even he was shocked at what he had heard from the Defendant.

You heard that he volunteered this information and that he's not gaining from it at all and that he wanted to come forward and tell you what the Defendant had told him about this horrible offense.

Ladies and gentlemen, that is the evidence that I have presented to you on behalf of the People of the State of

Illinois in brief preview which proves overwhelmingly that the Defendant is guilty of the offense of burglary and of home invasion.

There is no doubt from the Defendant's own testimony that he performed the acts which caused the death of Scot Siniscalchi, element number one.

I submit to you that there is also no doubt whatsoever that element number two is satisfied, that he intended to kill Scot Siniscalchi. In fact, he had [124] intended to kill Scot Siniscalchi for quite some time.

This, ladies and gentlemen, is an intentional, deliberate, premeditated, cold blooded, brutal murder, and there is no two ways about it.

We heard the testimony of the Defendant who took that stand and told you that he hated Scot Siniscalchi. He said he had hated him for a long time. He said that he was angry at him.

His own lawyer used the term "his injured pride" in his opening statement to you, and I believe he also used the word "jealousy."

Here is a man who is jealous and whose pride has been hurt, who is angry and who hates another person.

Ladies and gentlemen, that adds up to one thing, and that is intent to kill, and you heard it from that man's mouth.

It'll be interesting to hear what defense there is when you hear from the defense lawyer during closing arguments because I've heard none from the witness or from the evidence that defense presented.

This was not an accident. This was not self defense. This was not temporary insanity. It was not said he didn't know what he was doing. He admitted it, for heaven's sake.

[125] So it will be very interesting indeed what we hear.

Anger and hatred had been on his mind for a long time. He had thought about it. He thought about it in January

when he threatened to kill Scot Siniscalchi over the telephone. He thought about it—and he admitted this when they had the argument—he said, "We were face to face; we were arguing like this face to face," when he brought his daughter over for visitation. He thought about it then because he said he hated him even more.

He thought about it when he had the confrontation with Scot at the State Fairgrounds.

Hurt pride, anger, hatred—and he thought about it when he told his former mother-in-law at the Cottage Inn that some day he would get him.

This had been on his mind for a long time. This was not anything new to Kevin Taylor. Hatred was not new to Kevin Taylor. Anger was not new to Kevin Taylor.

He had a job to do. He had a purpose in mind, and he did it. He went about it very effectively.

He went over there at a high rate of speed. He took a knife with him. He kicked in the door, and he stabbed a man to death, the result, ladies and [126] gentlemen, of the very basic emotion of hatred and anger.

I submit to you, ladies and gentlemen, that not only has the State's case been proven overwhelmingly beyond a doubt whatsoever that the Defendant is guilty that his own testimony admitting what he did shows that he is guilty.

I urge you when you deliberate to return the only verdicts based on this evidence and the only just verdict that can possibly be returned, and that is a verdict of guilty to the offense of murder and home invasion.

Thank you.

THE COURT: Mr. Harris.

MR. HARRIS: Thank you, Your Honor.

CLOSING ARGUMENT FOR THE DEFENSE

Ladies and gentlemen, I promise to keep my voice up during my closing remarks.

I will be addressing you at this time on behalf of my client, Kevin Taylor, and this will be the only time that we will address you. We're not allowed to address you further.

Mr. Michelich, however, he is, and I'm sure that he will make remarks following ours.

There is a great deal of evidence in common here, evidence which has been brought to light by the [127] State and evidence that has been brought to light by the defense. That evidence is subject to your interpretation. Who do you believe? Whose version is more believable?

There is a great deal of common evidence here. The very evidence that the State wishes you to believe gave Kevin Taylor his premeditated disposition to kill Scot Siniscalchi can only be interpreted as provocation.

Besides or in addition to the instructions for murder which Mr. Michelich described, you will also be given an instruction on a crime called "voluntary manslaughter."

Voluntary manslaughter by its very sound, its very definition, involves the death of a human being, the killing of a human being, just like murder, but the law that you will be given to follow in considering whether or not this was a manslaughter case or a murder case involves an additional element, and the additional element is that there was a killing of a human being. Someone has lost a life, but at the time of the killing the person accused of that killing acts under a sudden and intense passion, sudden and intense passion resulting from serious provocation—[128] serious provocation.

This common evidence that I've referred to we feel establishes serious provocation, and as a result of that serious provocation Kevin Taylor's actions at 1:47 or 1:53 that

morning were the result of a sudden and intense passion resulting from this provocation.

What provocation? What provocation?

This common evidence that you've heard shows that as far back as November of 1984 there was a confrontation between Kevin Taylor and Scot Siniscalchi, and it took place in Scot's car on South Holmes Street in Springfield, and Kevin's wife was with Scot and Kevin knew it, and Kevin saw it, and Kevin saw them kissing or embracing, and he reacted.

He pounded on the hood of the car for them to stop, and he grabbed ahold of the car door and the driver took off down the street dragging him along.

That was the first encounter that Kevin Taylor had with Scot Siniscalchi, and, as you have heard, it was not the last. There were many more.

Provocation is what we're talking about here. Even though Kevin and Joyce reconciled, it was just a matter of days before Joyce moved from the apartment again—from their trailer again, leaving Kevin with his [129] toddler at that time, year old daughter—fourteen months, something like that.

And when a second chance of getting their marriage back together didn't work, Joyce left again, this time for good. She never returned to that trailer to live as the wife of Kevin Taylor.

In December of 1984 Kevin decided to file for divorce, and he did, and he had custody of his daughter and he wanted it to stay that way.

He asked for custody, but it was short-lived.

In early January Joyce, his wife at that time, accompanied by law enforcement agents, came back to the trailer and took custody of Katy—physical custody at that time.

Common evidence—January 15th, 1985, six or seven or eight phone calls from Kevin Taylor to Joyce, one of them overheard by a policeman.

He was suicidal; he threatened Joyce's life; he threatened Scot's life; he had nothing to live for at that particular time; he was despondent; he was depressed.

And over the next few months it was apparent from the testimony that you've heard that Joyce and Scot began living together, and in April of last year, 1985, [130] Kevin and Joyce were divorced.

Joyce was awarded custody.

I'm sure that the threats of January 15th had something to do with that.

But it was also at this time that Kevin decided or realized that he wasn't going to get his job back and he better get himself together, and with the support of his family and a student loan he enrolled in cosmetology school, learning a new trade, something that he'd be interested in.

And for at least some period of time things were rather smooth between Kevin and Joyce.

Common evidence. Common evidence is that during this period of time both Scot and Joyce would provide transportation to Katy to bring her to her father most every weekend. Her visits were arranged by Joyce calling Kevin. I'm sure at some times Kevin would call Joyce, but there were other times when Kevin and Joyce would see each other.

And Joyce Taylor admitted on cross examination that she'd shared her feelings with her husband—her ex-husband after the divorce.

She would visit Kevin often. She would call him once or twice a week.

[131] Again, common evidence.

Provocation?

In early May you heard testimony that Scot, while in the process of dropping Katy off, had a face to face shouting match, screaming match, confrontation with Kevin.

No blows were exchanged. They did not fight or wrestle. There was no physical contact between them.

Common evidence again. It's not in dispute.

There was a confrontation; there was an argument face to face.

Provocation?

The State relies heavily on the testimony of Joyce Taylor. She's an eye witness.

There is only two people can can [sic] testify as to what happened inside of that apartment, Kevin and Joyce, and there is only really one person who can testify as to what happened after Joyce left the bedroom during the struggle.

Joyce admitted on cross examination that she shared her feelings with Kevin, that they talked about reconciling, problems that she and Scot were having.

There was testimony concerning requests by Joyce for early child support, arguments over money, and [132] yet Mr. Gill, whom you heard yesterday afternoon, testified that sometime last summer Joyce called Kevin who was there, Kevin was out the door leaving Mr. Gill to Kevin's guest to get a haircut.

In spite of all their problems they still communicated and they still had something in common. They had a daughter, and they had to deal with each other, visitation, and they dealt with each other and they communicated with each other once or twice a week or more.

Kevin knew what was going on with Scot and Joyce. She kept him informed. She kept him informed. They had no choice but to communicate and keep in touch with each other.

Serious provocation, sudden and intense passion, serious provocation, hatred, and anger? Yes, those words have meaning here by Kevin's own testimony.

Do those confrontations, do those prior threats, do those sharing of problems and concerns by an ex-wife to her

ex-husband constitute serious provocation? That will be for you to decide.

The State would have you believe that this is not serious provocation resulting in sudden and intense passion, but rather that these phone calls and meetings [133] and confrontations showed a plan, an intent, a premeditation for Kevin to kill Scot.

He had threatened it. He didn't carry that threat out though in January of '85, face to face confrontation a few months later. No blows were exchanged.

The State would have you believe that these acts constitute a plan, an eight-month long plan to get Scot Siniscalchi some day.

In September of 1985 when this happened, Kevin and Joyce both knew that Scot would be going to the penitentiary soon. Kevin and Joyce talked about getting back together.

If these types of thoughts constitute an intent to kill, why wasn't there serious confrontations or battles, combat before September of 1985?

On the night preceding the murder—excuse me. On the night preceding this incident, Kevin Taylor had no thoughts of violence or confrontation.

If this was such a premeditated plan, could he hold that into himself? Could he be celebrating his birthday with friends?

In our opening statement we asked you to consider two periods of time, one from beginning of November, 1984 and ending in September of '85, and the other time [134] period lasting from about one o'clock in the morning on the date of this incident until two o'clock in the morning.

The evidence is very clear from common testimony that at one o'clock in the morning or close to that violence was the furthest thing from Kevin's mind.

You heard the Lawsons testify. At one o'clock that morning when Kevin went home, he was in a great mood. He was celebrating with his friends. He had a birthday to look forward to. He had visitation to look forward to. He made plans for the next morning. He made plans for the day after that.

Common evidence.

At one o'clock that morning Kevin was a reasonable person, no harsh words, no arguments, no discussion concerning Scot or Joyce, discussion concerning Katy, future plans.

And the common evidence will show that shortly after one that morning when Kevin called Joyce to arrange for visitation, Joyce testified that he was calm, he was bright, and he was cheerful.

So, Kevin was reasonable at 1:15 that morning, and a simple slip of mind, simple mistake—he'd forgotten this date the next morning, spending the day at the pool [135] with his daughter and another young lady. He called back—he called back, and this time he spoke with Scot.

Now, until that time, ladies and gentlemen, I don't think there is any dispute in the evidence by Joyce's testimony or the Lawsons' testimony that Kevin was in a cheerful mood looking forward to the events that weekend.

Then the mood changed.

A simple request to speak with his wife—his ex-wife concerning this minor change in plans, and you heard testimony that there was argument between these two men.

Joyce Taylor testified she heard at least three times leave them alone,—or, "Leave us alone," words to that effect, and whatever else took place during that conversation, and Scot slammed the phone down, changed that young man, changed his mood, changed his state of mind, and set him on a course that we all know how it ended.

Sudden—sudden passion.

At one o'clock he was reasonable, left Lawsons'. 1:15 he talked to Joyce; he was reasonable, cheerful, polite.

Sudden? Yes, it was sudden. It was a result [136] of that second phone call.

And after that second phone call Kevin jumped in his car and sped across town. He didn't drive slow. He didn't stop for stoplights or stop signs. He drove like a maniac to South Ninth Street.

And, yes, he was angry. Yes, he was incited. He was going to South Ninth Street to get Katy. He was going there—he knew where he was going.

And within a few minutes he found himself at the front door of this apartment building, and a moment later he found himself outside the door.

When his knocks went unanswered, he forced his way through the door.

Intense—intense passion.

A few minutes earlier the thought had not even crossed his mind.

He took no precautions. He couldn't have planned this action.

As Kevin entered that apartment—and you heard it from him—he told you like it was—as he followed the sounds from his daughter, the sounds from Joyce and Scot, as he entered the bedroom he stood at the doorway; he was boiling. He had just forced his way through that door, and he said, "I don't want any trouble. I just [137] come to get Katy."

Joyce made a movement. He told her to stay there. Scot made a movement, and all hell broke loose.

And these men became involved in a struggle, an intense struggle, a life and death struggle. And Joyce was involved in it, and there was screaming, and there was yelling, and the man across the street was awakened by the screams.

That's what kind of scene this turned into, Pandemonium, mayhem.

Intense passion? Intense act?

Kevin testified that he stabbed Scot. Yes, he did. He admitted it.

His actions afterwards show his lack of premeditation.

Could he possibly think that his ex-wife could not identify him? Could he possibly think that?

He looked at her for help, as Joyce testified, with a blank look on his face. He told her he loved her, and he ran out the door.

We submit to you that his actions were sudden and intense.

The jury instruction that you will take with you states that at the time of the killing the accused—[138] the accused acts under a sudden and intense passion resulting from serious provocation.

We have discussed those elements of serious provocation, be they confrontations in November of '84, Scot and Joyce in the car, be they threats back and forth in early 1985, be they face to face confrontation with this man a few months prior, be they obscene gestures a month before this incident.

Serious provocation?

We feel there is serious provocation here.

And the second phone call from Kevin to Joyce's apartment between—the conversation between Scot and Kevin incited—excited Kevin Taylor, who up until that time was celebrating with friends, looking forward to the next day, looking forward to visitation with his daughter, which Scot was going to deny. Kevin was a reasonable person at one o'clock that morning. He was a reasonable person at 1:15 that morning, but at 1:30 with that phone call and that breakneck drive through town that was a sudden and intense onslaught for him of emotion, feelings, the result of serious provocation over ten months—ten months.

A person who plans an act like this doesn't make plans for the next day or that weekend, the new few [139] days.

This is a tragedy that's happened here. It certainly is a tragedy for the people involved and their families.

Perhaps it was that thought or those feelings which prompted Joyce Taylor as she sat on the floor with Scot to say, "I'm sorry—I'm sorry."

But try as she did perhaps at times to keep these men from confrontation, they confronted each other that morning after that second phone call.

This is no laughing matter. Kevin Taylor did not laugh today when he took the witness stand.

And we're not asking you, ladies and gentlemen, to justify that killing. We're not asking you to justify what happened on South Ninth Street.

We're asking you to rememver [sic] the common evidence, threats, confrontations, divorce, problems with visitation. We're asking you to keep in mind especially the time elements involved here. It's just crucial. It's crucial to your determination. I can't stress it enough.

At one o'clock Kevin had no thoughts whatsoever of even going to South Ninth Street, let alone engage in an act of violence. It was the last thing on [140] his mind.

And during his conversations with his ex-wife there was no animosity, there was no hatred, there was no threats. It was the furthest thing from his mind.

Sudden and intense passion resulting from serious provocation.

We have discussed serious provocation leading up to the phone call with Scot. We have discussed serious provocation for sure as a result of that phone conversation with Scot, and within a few minute, how ever long it took him to drive the way he drove to South Ninth Street, this happened.

We're not asking you to justify this killing. We're asking you to consider the elements of voluntary manslaughter as you deliberate on the fate of this young man.

We're asking you to find Kevin Taylor not guilty of murder, but guilty of voluntary manslaughter.

Thank you.

THE COURT: Dorothy, let's take a ten-minute break.

(A ten-minute recess was taken.)

THE COURT: Court's reconvened.

Mr. Michelich.

MR. MICHELICH: If it please the Court.

REBUTTAL ARGUMENT FOR THE PROSECUTION

[141] Members of the Jury, you are being asked to justify this murder because of some difficulty that the Defendant had in his own mind concerning his divorce. You are being asked to justify this murder.

Manslaughter is nothing more than a partial justification for murder. It's a lesser offense, partially justified under extenuating circumstances, and Mr. Harris is, in fact, trying to get you to justify this murder by claiming that there were extenuating circumstances as a result of this divorce.

Now, all divorces are difficult for everybody. Some divorces cause emotional trauma for both parties.

Is that a justification for murder?

You know, I saw a statistic not too long ago that I believe says that over 50 percent of the marriages in the United States ended in divorce.

Are we being asked to justify murder whenever a divorce causes emotional upset to people?

Yes, you're being asked to justify it.

I submit to you that there is absolutely no justification in the evidence that you have before you in this case for what that man did on the early morning hours of September 14th.

Mr. Harris calls it "provocation." I call it [142] "motive."

He has motive to kill.

Mr. Harris says that one o'clock in the morning he was a perfectly reasonable man; at 1:47 he was a murderer.

That's motive.

The instruction Mr. Harris referred to talks about sudden and intense passion.

The word "sudden" is the operative word there.

If there is a long period of time over which the Defendant thinks about it and gets madder and gets angrier and increases his hatred for the man he kills, it's no longer a sudden and intense passion; it is revenge. That's what it is, revenge over a long period of time.

You see, the purpose of manslaughter in this case—.

MR. MILLER: Your Honor, I'm going to object to what the purpose of manslaughter is. That's a legal argument, and it's for the Court to instruct this jury as to law and what the meanings of the different offenses are, and I would object rather strenuously. He knows better than to do that.

THE COURT: The Court will instruct the Jury as to [143] the law as to both murder and manslaughter.

MR. MICHELICH: It's perfectly proper—thank you, Your Honor.

In this case you will receive an instruction as to manslaughter, and you will see that it says, "Sudden and intense passion."

Now, under an example where somebody comes up to you and clobbers you over the head with a club or tries to shoot you, and you respond immediately, that's sudden and intense passsion, but it's right there. It's not over ten months.

Over ten months where a person has an opportunity to think about what he's doing, to think about how he should abide by the law and listen to the voice of reason. Over ten months he had plenty of opportunity to think about what he was doing.

Mr. Harris says that the ten months show provocation. That's not sudden, over ten months, ladies and gentlemen, and that is what manslaughter means, and that's what you will be instructed about.

MR. MILLER: Your Honor, I renew the objection.

THE COURT: You may proceed.

MR. MICHELICH: You will be instructed what the word "sudden" requires, what is "sudden and intense [144] passion" and there is no evidence at all of anything sudden in this case such that the Defendant could be justified in responding with force, nothing whatsoever.

There is also the double standard here.

You know, it's odd that the Defendant felt hatred and so forth because his ex-wife had a new boyfriend, but it was all right for him to go out on dates and have new girlfriends.

It's that sort of a double standard that's being applied here. It's all right for him to claim provocation after ten months.

You know, there is another example I want you to consider.

Could a man who goes into an all night convenience store and robs the clerk, and the clerk argues with him and doesn't do what he says, could that man claim sudden and intense passion when he shoots the clerk dead during a robbery?

I think we would all agree that under those circumstances that would be ludicrous.

Likewise, in this case where a man drives the distance from the trailer court on North Grand and Bruns Lane, the Brookview Trailer Court in the northwest corner of

our city, across the city clear out to South [145] Ninth Street, the 2300 block of South Ninth Street, with a knife and a man who kicks in the door, can he claim provocation?

If he can claim provocation, so can the armed robber if the clerk doesn't follow his instructions.

Ladies and gentlemen, that makes no sense.

This is not a case of provocation. Not for one minute should you believe that this is a case of provocation.

This is a case of motive, revenge, and hatred, and it's that simple.

You've probably heard either at church or school or someplace about the seven deadly sins. Sometimes I have trouble remembering them, but you probably remember that there is hatred, pride, jealousy, anger, gluteny, sloth, and lust. At least that's what I was taught.

And in that list of seven deadly sins I find four that the Defendant has virtually admitted as a motive for murder.

Jealousy? You bet.

He was jealous because his ex-wife was living with this man, and he was jealous because this man lived in the same household with his daughter.

[146] Pride? He admitted as much.

He said his pride was hurt. His price was hurt when Scot Siniscalchi laughed at him at the fair. His pride was hurt when he knew that Scot had the little girl during the day.

Anger? You bet.

He had anger against Scot Siniscalchi all the time. He had argued and he had threatened Scot's life on a couple of occasions.

Hatred?

From that witness stand he told you that he hated the man he killed.

This is not provocation; this is a motive for murder.

When I say "motive" I mean a reason. Motive is not an element of murder. Motive is the reason why the murder occurred.

And that man, Kevin Taylor, had a motive for murder, and he told you what it was: His hatred of the man who was living with his ex-wife.

No, ladies and gentlemen, this is not a case of provocation. This is a case of intent to kill, this is a case of premeditated murder, and it's a case of only pure intent. [147] You heard evidence of a number of reasons. I'm going to give them to you briefly of why this is a case of intent to kill.

Now, Mr. Harris talks about voluntary manslaughter. I submit to you that you should ignore the verdict form as to voluntary manslaughter.

You'll also get another instruction which says something like this: That since the Defendant is charged with both murder and voluntary manslaughter, if you find the Defendant guilty you may find him guilty of either offense, but not both.

I submit to you that your proper verdict is to find him guilty of murder and to ignore manslaughter entirely.

However, the instruction will say that if on the other hand you are to find him not guilty, you may find him not guilty of both. It doesn't make any difference in that case.

My suggestion to you under the evidence of this case is that you return only one verdict form to the Jury room and that is guilty of the offense of murder.

That is based on the following factors as I'm going to suggest to you.

[148] You may be able to think of more factors, but I want to give you a list that I've created here based upon the evidence that shows the Defendant had the intent to kill.

First, there was a threat over the phone January 15th, 1985 witnessed by Officer Baughman and Joyce Taylor.

There was also another threat to kill Scot Siniscalchi to June Phares at the Cottage Inn during the summer of 1985.

There was argument with Scot during the summer one day when he brought Katy over for visitation.

There was further hatred developed during the incident at the fair in August of 1985, and there was a further hatred developed during the phone call on the night of the murder.

What did he do? What did that man do that shows what his intent was?

He drove over there in a fit of rage at a high rate of speed. He took his hunting knife with him. He put it in his waist and went up the steps.

He parked his car up the street. He didn't pull it right in front of the door so people could see who he was. He parked his car up the street. That [149] takes some forethought, doesn't it?

Then what did he do?

He kicked in the door just like the man in the—in the all night convenience store who was committing a forcible felony. This man is now committing a forcible felony, that being home invasion, when he kicks in the door.

He jumped on Scot Siniscalchi as he lay in bed. He fought with Scot to put a hole in the wall.

He stabbed Scot, not once, not twice, not three times, but seven times.

Intent to kill, stabbing him seven times? Provoked to stab somebody seven times in his own bed? Provocation?

You saw the deep stab wounds in the pictures.

In fact, he was so violent and so intent upon stabbing that man to death that he cut his own arm.

He said he slipped, cut his own arm. He was stabbing that man so hard and so fast that he cut himself.

And then to prevent Joyce from calling for help, he tore the phone from the wall, and then he ran from the building slamming the door behind him.

Was he provoked to do all of that?

[150] Then was he provoked as he concealed the evidence of his murder?

And you'll remember that's the exact words I used. "You concealed evidence of a murder, did you not, Mr. Taylor?"

And he said, "Yes, I did."

Provocation? No way.

He threw the clothes covered with the blood of a man he had stabbed to death, in a trash can, and then he threw the murder weapon out on the way, concealed evidence.

And when he got back to his trailer—does a man who is provoked to a sudden passion then go to the lengths that he has to conceal his crime?

He made up false evidence, and he admitted it. He smeared his own blood on a knife, and he told the police a lie, a lie that he stuck with until he said he came to the conclusion of what he would tell you folks just a couple of months ago, a lie that he stuck with for several months.

Ladies and gentlemen, only the guilty conceal evidence, only the guilty make up false evidence, only the guilty lie. And the man is an admitted liar, and the man is an admitted felon, committing a forcible [151] felony as he entered the dwelling place of those people.

MR. MILLER: Your Honor, I'm going to object to the characterization that he's using. I think it's improper to use those kinds of words, and I object to it.

MR. MICHELICH: This is argument.

THE COURT: The record will show your objection. You may proceed.

MR. MICHELICH: Thank you.

He admitted that he kicked in the door and went into those people.

And I urge you also to consider your verdict forms also as to the offense of home invasion, because a person who is provoked suddenly and kills somebody doesn't go to the lengths that this man went to commit the offense of home invasion.

So my suggestion to you, ladies and gentlemen, I submit to you that the evidence in this case supports only one type of verdict and that is that you find the Defendant guilty of the offense of murder, that you return no verdicts at all one way or the other as to the offense of manslaughter, because it is not supported by the evidence, and that you return a verdict of guilty as to the offense of home invasion.

Thank you very much.

* * * * *

JURY INSTRUCTIONS

* * * * *

[155] * * * A person commits the offense of murder when he kills an individual without lawful justification if, in performing the acts which caused the death, he intends to kill or do great bodily harm to that individual or another; or he knows that such acts will cause death to that individual or another; or he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or he is committing the offense of home invasion.

To sustain the charge of murder, the State must prove the following propositions:

First: That the Defendant performed the acts which caused the death of Scot Siniscalchi; and

Second: That when the Defendant did so he [156] intended to kill or do great bodily harm to Scot Siniscalchi; or he knew that his act would cause death or great bodily harm to Scot Siniscalchi; or he knew that his acts created a strong probability of death or great bodily harm to Scot Siniscalchi; or he was committing the offense of home invasion.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

A person commits the offense of home invasion when he, not being a police officer acting in the line of duty, without authority, knowingly enters the dwelling place of another when he knows or has reason to know that one or more persons is present, and intentionally causes any injury to any person within the dwelling place.

To sustain the charge of home invasion, the State must prove the following propositions:

First: That the Defendant was not a police [157] officer acting in the line of duty; and

Second: That he knowingly and without authority entered the dwelling place of another; and

Third: That when he entered the dwelling place he knew or had reason to know that one or more persons was present; and

Fourth: That he intentionally caused an injury to Scot Siniscalchi, a person within the dwelling place.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

A person commits the offense of voluntary manslaughter when he kills an individual if, in performing the acts which caused the death, one, he intends to kill or do great bodily harm to that individual or another; or, two, he knows that such acts will cause death to that individual or another; or, three, he knows that such acts create a strong [158] probability of death or great bodily harm to that individual or another; and at the time of the killing he acts under a sudden and intense passion resulting from serious provocatin [sic] by the deceased. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

To sustain the charge of voluntary manslaughter, the evidence must prove the following propositions:

First: That the Defendant performed the acts which caused the death of Scot Siniscalchi, and

Second: That when the Defendant did so he intended to kill or do great bodily harm to Scot Siniscalchi; or he knew that such acts would acts would [sic] death or great bodily harm to Scot Siniscalchi; or he knew that such acts created a strong probability of death or great bodily harm to Scot Siniscalchi;

Third: That when the Defendant did so he acted under a sudden and intense passion, resulting from serious provocation by another.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.

[159] If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

As stated previously, the Defendant is charged with committing the offense of murder and voluntary manslaughter. If you find the Defendant guilty, you must find him guilty of either offense; but not both. On the other hand, if you find the Defendant not guilty, you can find him not guilty on either or both offenses.

* * * * *

VERDICT OF THE JURY

[164] * * * THE COURT: Have you reached a verdict?

MR. WASHINGTON: Yes, sir, we have.

THE COURT: Will you hand it to the Bailiff, please.

"We, the Jury, find the Defendant, Kevin Taylor, guilty of the offense of home invasion.

"We, the Jury, find the Defendant, Kevin Taylor, guilty of the offense of murder."

Ladies and gentlemen of the Jury, is that your verdict?

[165] MR. WASHINGTON: It is.

* * * * *

VOLUME XIV

[1][1] IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	Criminal No. 85-CF-536
-vs-	)	
KEVIN W. TAYLOR,	)	
Defendant.	)	

REPORT OF PROCEEDINGS of the hearing before the Honorable Simon L. Friedman, on the 15th day of May, 1986.

APPEARANCES:

THE HONORABLE J. WILLIAM ROBERTS,
State's Attorney of Sangamon County, by
MR. JOHN A. MICHELICH,
Assistant State's Attorney, for the People.

MESSRS. JOSEPH W. MILLER and DAVID K. HARRIS,
for the Defendant.

* * * * *

[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

SENTENCING

[87] * * * THE COURT: The Court's been considering this case ever since the Jury returned the verdict. It's been on the Court's mind.

The Court has reviewed the Pre-sentence Investigation, repeatedly looking for the aggravated circumstances of the crime, looking for the mitigating circumstances of the crime.

The Court recognizes that two families have been destroyed in this senseless act.

I never did understand Joyce Taylor throughout [88] this case. Knowing that her ex-husband had emotional problems, she didn't even take the time to deliver her child herself to him for visitation, sent her with the boyfriend.

If anybody can ever explain that to me, they'll have to write another report.

This Court knows full well that the Kevin Taylor that sits before this Court at this time does not belong in society. He has evidenced this by the act he committed. He has evidenced it by his prior record, so the Kevin Taylor that sits before this Court must forfeit his rights to be in society.

The Court is of the opinion that there is an older Kevin Taylor that should have the right to once again be out in society.

The Court rejects the prosecution's contention that this case comes under the brutal and heinous sections of the Statute. The Court believes that it only has the authority under the Statute to impose a sentence of from twenty years to forty years.

The Court is going to sentence the Defendant and does sentence the Defendant to thirty-five years in the Department of Corrections, Adult Division, State of Illinois, on the charge of murder, and that the [89] mandatory supervised release term of three years [sic].

The Court is also sentencing the Defendant to a period of six years for home invasion with a three year mandatory supervised release term, both sentences to run concurrently. It is the order of this Court then that the Defendant, Kevin W. Taylor, be sentenced to the Department of Corrections, Adult Division, State of Illinois, for a term of 35 years, mandatory supervised release term of three years, for murder, and sentenced to the Department of Corrections, Adult Division, for a term of six years for the offense of home invasion, mandatory supervised release term of three years.

Judgment is entered against the Defendant for the costs of these proceedings.

It is the further order of this Court that the Defendant be given credit for the time spent awaiting trial on this charge, which time the Court finds to be 244 days.

Is the Court correct?

MR. MICHELICH: That's right, Your Honor.

MR. MILLER: Yes, Your Honor.

THE COURT: You will be given credit for the 244 days spent in the County Jail awaiting trial for this [90] particular case.

The Defendant is remanded to the custody of the Sheriff of Sangamon County for transmittal to the Department of Corrections.

* * * * *

VERDICT FORMS

We, the jury, find the defendant KEVIN TAYLOR Not Guilty of the offense of murder.

_____

Foreperson

J.A. 136

We, the jury, find the defendant KEVIN TAYLOR Not Guilty of the offense of home invasion.

Foreperson

C 375

J.A. 137

We, the jury, find the defendant KEVIN TAYLOR Guilty of the offense of murder.

Foreperson

C 376

We, the jury, find the defendant KEVIN TAYLOR Guilty of the offense of home invasion.

Foreperson

C 377

We, the jury, find the Defendant, KEVIN TAYLOR, Not Guilty of the offense of Voluntary Manslaughter.

Foreperson

C 378

We, the jury, find the Defendant, KEVIN TAYLOR, Guilty of the offense of Voluntary Manslaughter.

_____

Foreperson

Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

No. 91-1738

In The

Supreme Court of the United States

October Term, 1992

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

Of Counsel:

TIMOTHY P. O'NEILL
Professor of Law
John Marshall Law School
315 S. Plymouth Court
Chicago, Illinois 60604

LAWRENCE C. MARSHALL
(Counsel of Record)
ROY T. ENGLERT, JR.
CARLOS T. ANGULO
RAGESH K. TANGRI
MAYER, BROWN & PLATT
190 South LaSalle St.
Chicago, Illinois 60611
(312) 701-7355

ROBERT AGOSTINELLI
Deputy Defender
Office of the State
Appellate Defender
Third Judicial District
1100 Columbus Street
Ottawa, Illinois 61350

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Did the Seventh Circuit rely on a new rule of law that came into effect after August 3, 1987, when it ruled that Kevin Taylor's right to due process of law was violated when he was convicted of murder by a jury that had been given instructions that had the likely effect of mistakenly informing the jury to disregard Taylor's defense?

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COUNTERSTATEMENT OF THE CASE

I. The Events

Kevin Taylor first came into contact with Scott Siniscalchi in November 1984, when Taylor discovered his wife and Scott Siniscalchi kissing and embracing in a parked car at 2:00 a.m. J.A. 26-27, 58. Kevin Taylor approached the car and knocked on the windshield, at which time Siniscalchi put the car in gear and dragged Taylor down the road at a high rate of speed. J.A. 58. Taylor suffered multiple injuries, including a broken left hand. *Id.*

Shortly after this incident, Joyce Taylor moved out of the home she had shared with her husband, leaving their two-year-old daughter, Katy, with Kevin. J.A. 59. Joyce soon moved back in with Kevin, but the reconciliation did not last long and in early December, she once again left Kevin and Katy. J.A. 26, 59. One month later, Joyce arrived at the family's home with a sheriff and took away her belongings and Katy. J.A. 60. Kevin was distraught over losing his family and in a conversation with Joyce on January 15, 1985, he threatened to kill himself as well as Joyce, her boyfriend, and Katy. J.A. 25, 45.

In April 1985, Kevin and Joyce Taylor were divorced. Kevin was given visitation rights on all weekends, birthdays and holidays. J.A. 61. Kevin's time with his daughter Katy was an exceptionally significant part of his life; he was very close to Katy and took her everywhere he could. J.A. 53. These visitations, however, put Kevin into rather frequent contact with Scott Siniscalchi, as Joyce often arranged to have Scott drop off Katy at Kevin's home. J.A. 64-65. On some of these occasions, Kevin and Scott had heated words, but Kevin never struck Scott nor otherwise took violent action. J.A. 65-66. The bad blood between the two never subsided, though. In August 1985, while both Kevin and Scott were working at the Illinois

State Fair, Scott made it a practice to point at Kevin, laugh at him, and make obscene gestures toward Kevin. J.A. 69. Kevin suffered this embarrassment in silence. *Id.*

Kevin Taylor was scheduled to spend the day with his daughter on Saturday, September 14, 1985. The weekend was particularly important to Kevin as he was celebrating his birthday and had made plans to take Katy swimming on Saturday morning. J.A. 54-55, 70, 76. Kevin spent Friday night socializing with two couples from his neighborhood. When he left that gathering at around 1:00 a.m., Kevin was, by all accounts, in an excellent mood. J.A. 53-57, 71. As soon as he arrived home, Kevin called Joyce in order to arrange his visit with Katy for the next morning. J.A. 72. (This was not unusual. Kevin often called Joyce late at night, as she frequently worked the late shift and did not get home until 1:00 a.m. *Id.*) Joyce and Kevin discussed a number of subjects during their conversation, including her relationship with Scott Siniscalchi. J.A. 33-35. The two agreed that Joyce would drop Katy off at Kevin's home on Saturday morning. J.A. 73. According to both Joyce and Kevin, the conversation was "civil and polite" and Kevin sounded "happy" to Joyce. J.A. 35. The conversation lasted long enough to prompt Scott Siniscalchi to ask Joyce why she had been on the phone so long. J.A. 37.

Just a few minutes after hanging up with Joyce, Kevin remembered that he was planning to take Katy swimming the next morning and that he needed to be with her earlier than the time he and Joyce had arranged. J.A. 73. Kevin called Joyce again, but this time Scott Siniscalchi answered the phone. Scott refused to let Kevin talk to Joyce, and refused to be of any help in ensuring that Kevin could get Katy in the morning. *Id.* Kevin told Scott: "Well, why don't I just come over there right now and get her out of your hair? That way you and Joyce can

have some time together." J.A. 77. Scott responded by saying: "Well, suit yourself, but you're not going to get her." *Id.* Scott then slammed the phone down. *Id.*

Kevin got in his car and drove to the apartment where Katy lived with Joyce and Scott. He testified that "I wanted to get to my ex-wife's house as soon as possible to get my daughter." *Id.* As he arrived at the house, Kevin remembered that he had been beaten a few months earlier – a beating he suspected Scott of having arranged. Kevin decided, therefore, to bring his hunting knife from his car in with him. He placed it in a sheath in his pants. J.A. 66, 78-79. Kevin testified that all he was thinking about was "[j]ust getting my daughter. That was the only thing that was on my mind was getting my daughter and going home." J.A. 79.

When Kevin reached the apartment he banged once on the door. J.A. 80. He could hear his daughter crying but no one answered. After Kevin banged once again and received no response, he kicked the door open. *Id.* Kevin followed his daughter's cries into the apartment's bedroom where he found Katy in her makeshift bed – a pallet that was on the floor next to the bed in which Scott and Joyce were together. *Id.* This was the first time Kevin had ever seen his daughter's paltry sleeping arrangements or the proximity of her pallet to the bed that his ex-wife and her boyfriend shared. J.A. 38.

According to Kevin Taylor's testimony, when he entered the room "I looked at and told them that I didn't want no trouble; I just wanted my daughter." J.A. 80. Kevin had nothing in his hands at that moment. *Id.* As soon as Kevin reached down to pick up his daughter, though, "Scott started to roll out of bed and looked like he was reaching for something – I don't know – but that's when I jumped on him." J.A. 81. Kevin testified that a

fight ensued in which Joyce was grabbing Kevin's shoulders from behind and "Scott was pulling me forwards, and finally they threw me into the wall and I hit my head, and that's when I grabbed the knife." *Id.* In the course of the struggle (which was violent enough to leave a large hole in the wall of the bedroom, J.A. 23), Kevin stabbed Scott. Although Kevin did not remember speaking with Joyce as he left the house (J.A. 90), Joyce testified that he stopped and told her "I love you." J.A. 40. Scott was pronounced dead by paramedics who arrived at the house. Kevin was arrested later that evening.[1]

II. The Trial

At trial, Taylor admitted that he had stabbed Scott Siniscalchi and had caused his death. J.A. 81. His sole defense was that he was not guilty of murder because he had "acted under a sudden and intense passion resulting from serious provocation by * * * [t]he individual killed." Ill. Rev. Stat. ch. 38, ¶ 9-2(a) (1985). It is undisputed that a showing of sudden and intense passion of this type acts as an affirmative defense to murder and transforms the crime into voluntary manslaughter.[2]

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[1] Because this case turns on Taylor's right to present his defense and to have his defense considered, the evidence relating to that defense is viewed in the light most favorable to the accused. See *People* v. *Larry*, 144 Ill. App. 3d 669, 676, 494 N.E.2d 1212, 1218 (2d Dist. 1986); *People* v. *Carpentier*, 20 Ill. App. 3d 1024, 1027, 314 N.E.2d 647, 649 (3d Dist. 1974). See also *United States* v. *Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984); *United States* v. *Lewis*, 592 F.2d 1282 (5th Cir. 1979). The testimony of Joyce Taylor differed somewhat from that of Kevin. See Petr's Br. 3-5. By all accounts, however, Joyce was not in the room during most of the struggle or the stabbing of Scott Siniscalchi. J.A. 39.

[2] The distinction between murder and voluntary manslaughter in Illinois at the time of Taylor's trial was quite unique. An individual could be convicted of voluntary manslaughter only if the jury found that he was *guilty of all of the elements of murder* but also had one of two affirmative defenses to murder (sudden and intense passion or unreasonable self-defense). See *People* v. *Wright*, 111 Ill. 2d 18, 27-29, 488 N.E.2d 973, 978 (1986). This scheme was changed, effective July 1, 1987; what was previously "murder" is now "first degree murder," and what was previously "voluntary manslaughter" is now "second degree murder." Pet. App. 4 n.1.

The trial judge found that sufficient evidence in support of the defense had been presented to require an instruction on Taylor's theory of defense – that he acted under sudden and intense passion resulting from serious provocation.[3] J.A. 96 ("The Court's going to let the Jury decide * * * whether that provocation existed here or did not."). See also J.A. 101 (reiterating this holding). The question of sudden and intense passion was, therefore, the one and only disputed factual issue that Taylor's jury had to decide.

Although the trial court had ruled that Taylor was entitled to have the jury consider his affirmative defense, the murder instructions that the judge delivered never mentioned the defense. Instead, they simply instructed the jury that Kevin Taylor was guilty of murder so long as the elements of that crime were proven. Nowhere in the course of the murder charge was there any mention of the affirmative defense that Taylor was relying upon. See J.A. 128-129. Rather, after telling the jury about the elements of murder, the judge stated: "If you find from your consideration of all the evidence that each one of these

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[3] This ruling has never been challenged on appeal and represents the definitive statement of Illinois law on Taylor's entitlement to have this defense considered. A series of Illinois precedents confirm the trial court's ruling on this point. See J.A. 94-95.

propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty." J.A. 129.

Later, the court turned to the voluntary manslaughter charge, instructing the jury that a person is guilty of voluntary manslaughter when he has killed an individual while possessing the requisite state of mind, and at "the time of the killing acts under a sudden and intense passion resulting from serious provocation by the deceased. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person." J.A. 129-130.

Finally, the trial court gave the following instruction in an attempt to apprise the jury of the relation between the murder and the voluntary manslaughter charge:

> As stated previously, the Defendant is charged with committing the offense of murder and voluntary manslaughter. If you find the Defendant guilty, you must find him guilty of either offense; but not both. On the other hand, if you find the Defendant not guilty, you can find him not guilty on either or both offenses.

J.A. 131.

The prosecutor himself recognized that these instructions failed to inform the jury of the relationship between the offenses of murder and manslaughter. The prosecutor suggested, based on a then-recent decision of the Illinois Appellate Court,[4] that the judge include an instruction explaining how Taylor's sudden and intense passion claim could serve to constitute a complete defense to the murder charge. The prosecutor made this proposal because he did not "want to knowingly create error here." J.A. 101. In denying the prosecutor's request, the trial judge responded that "we're not doing it knowingly; we're doing it out of ignorance." *Id.*

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[4] *People* v. *Bolden*, 132 Ill. App. 3d 1047, 477 N.E.2d 1380 (4th Dist.), appeal denied, 108 Ill. 2d 574 (1985).

After brief deliberations, the jury announced that it had found Kevin Taylor guilty of murder and returned a signed verdict form on that charge. The jury never mentioned the voluntary manslaughter charge, however, and returned unsigned both the guilty and not-guilty forms for that offense. J.A. 131, 135-140.

The trial court sentenced Kevin Taylor to thirty-five years in prison on the murder conviction. J.A. 133. In rejecting the State's request for an enhanced penalty, the trial judge commented on the tragedy that had occurred and the extent to which Kevin Taylor was something other than a cold-blooded murderer: "I never did understand Joyce Taylor throughout this case. Knowing that her ex-husband had emotional problems, she didn't even take the time to deliver her child herself to him for visitation, sent her with the boyfriend. If anybody can ever explain that to me, they'll have to write another report." J.A. 133.

III. The Appeal and the Post-Conviction Proceedings

The Illinois Appellate Court declined to entertain Kevin Taylor's attack on the murder-voluntary manslaughter instructions. The court held that Taylor was not entitled to rely on the prosecutor's request to modify the instructions, and that he had waived the claim by not raising the issue himself at trial. Pet. App. 37-38. The Illinois Supreme Court denied Taylor's petition for leave to appeal on June 4, 1987 (*People* v. *Taylor*, 115 Ill. 2d 549, 511 N.E.2d 436 (1987)), and his conviction became final on August 3, 1987, the date that his time for filing a petition for certiorari expired.[5]

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[5] Under the rules in effect in 1987, a criminal defendant had 60 days to file a petition for certiorari. Conceivably, though,

Taylor then brought a petition for post-conviction relief, arguing that his trial counsel had been ineffective in not joining with the prosecutor in urging a change in the murder-voluntary manslaughter instructions. Shortly after the trial court dismissed this post-conviction action, the Illinois Supreme Court issued its decision in *People* v. *Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), holding that the giving of similar murder-voluntary manslaughter instructions constitutes "grave error," and requires reversal of convictions obtained under these instructions, whether or not the defendant had objected at trial. Part of the Illinois Supreme Court's reasoning was that "the murder instruction makes no mention of the mitigating mental conditions" and that the jury was, therefore, instructed to find the defendant guilty of murder even if one of the defenses had been proved. *Id.* at 194, 526 N.E.2d at 145. The court in *Reddick* considered the flaws in these instructions to be so troubling that it granted relief to one defendant who had not even raised the issue on appeal. See *id.* at 199, 526 N.E.2d at 147 (1988).[6]

On appeal from the denial of his post-conviction relief, Taylor argued that *Reddick* was controlling, particularly on the point that "this type of murder instruction 'essentially insure(s) that, if the jury follows them, the

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Taylor could have brought his case as an appeal under 28 U.S.C. § 1257(2) (1987), which would have extended the time limit to 90 days. See Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, **Supreme Court Practice** 301-302 (6th ed. 1986). Defining the precise date on which Taylor's conviction became final is unnecessary here because Taylor seeks the benefit of no cases decided after the date of his actual trial. See Pet. App. 5 n.2.

[6] Given this holding, the State has wisely chosen not to argue that Taylor waived his attack on the instructions by not asserting it at trial. See Pet. App. 17 n.5 (concluding that State has "waived waiver").

jury cannot possibly convict a defendant of voluntary manslaughter' " because the jury will always convict of murder. Brief and Argument of Defendant-Appellant, No. 4-88-0075, at p. 11 (quoting *Reddick*). The Appellate Court rejected Taylor's reliance on *Reddick*, however, holding that even though the *Reddick* court described the giving of these instructions as "grave" and non-waivable error, the error was not of constitutional magnitude and accordingly could not be the basis of post-conviction relief.[7] Pet. App. 41. The Illinois Supreme Court denied Taylor's petition for leave to appeal on October 5, 1989. *People* v. *Taylor*, 127 Ill. 2d 637, 545 N.E.2d 127 (1989).

IV. The Federal Habeas Corpus Proceedings

Taylor then filed a habeas corpus action in the United States District Court for the Central District of Illinois. He asserted "that his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment" had been violated because the instructions "left the jury unable to recognize the defendant's affirmative defense." Mem. in Support of Pet. 2. He explained that one of the constitutional flaws in the instructions was that they " 'deprived [petitioner] of [his] affirmative defenses entirely: if the jury found [petitioner] killed * * * then it had to convict [him] of murder regardless of whether [he] acted under serious provocation.' " *Id.* at 7 (quoting *United States ex rel. Falconer* v. *Lane*, 720 F. Supp. 631, 643 (N.D. Ill. 1989)).

The District Court began its analysis of this claim by noting that "[t]he state concedes that, under the current

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[7] Illinois courts have held that the Illinois Post-Conviction Relief Act may be used only to redress the denial of a constitutional right. See *People* v. *Shaw*, 49 Ill. 2d 309, 311, 273 N.E.2d 816, 817 (1971).

state of the law, the jury instructions used in Taylor's trial amount to a due process violation." Pet. App. 29. The court explained that in *Falconer* v. *Lane*, 905 F.2d 1129 (7th Cir. 1990), the Seventh Circuit had held that "such jury instructions on murder and voluntary manslaughter, when read together as they were at Taylor's trial, erroneously permit a jury to convict a defendant of murder even where it finds the presence of one or more mitigating circumstances" that qualify as defenses to murder. Pet. App. 29. Nonetheless, the court ruled that *Teague* v. *Lane*, 489 U.S. 288 (1989), barred habeas corpus relief because Taylor was invoking a "new rule" that had not been settled in August 1987, when his conviction became final. Pet. App. 32. The District Court reasoned that even though Taylor's claim broke no doctrinal ground, the rule that Taylor sought to invoke constituted a new rule because it had not been applied "to the specific situation" of the Illinois murder and voluntary manslaughter instructions by the time Taylor's conviction became final. Pet. App. 31 (citation omitted).

The Seventh Circuit reversed in an opinion written by Judge Flaum and joined by Judges Posner and Manion. Pet. App. 1-24. The court held that a decision does not constitute a "new rule" simply because it represents the first time that an established doctrine has been applied to the precise factual situation – in this case, Illinois' murder-voluntary manslaughter instructions. Rather, the court explained, the *Teague* inquiry requires an examination of the state of the law at the time the petitioner's conviction became final and a determination as to whether the law in effect at that time can be said to compel the result that the habeas petitioner is seeking. Specifically, the court announced (Pet. App. 12):

> First, we determine whether the case clearly falls in one category or another – if it overrules or significantly departs from precedent, or

> decides a question previously reserved, it is a new rule, while if it applies a prior decision almost directly on point to a closely analogous set of facts, it is not. Second, when the question is a close one, we will look to (1) whether the case at issue departs from previous rulings by lower courts or state courts, and (2) the level of generality of prior precedent in light of the factual context in which that precedent arose.

Applying these standards to this case, the court first ruled that the result that Taylor advocated (and that the Seventh Circuit had reached earlier in *Falconer*) did not depart, in any way, from any of the Seventh Circuit's previous precedents. Pet. App. 17-18. The court then found that the result Taylor sought did not depart from the holdings of any lower federal courts or state courts, as no court had ever held that these instructions were constitutionally adequate. *Id.* at 18-19. Given these conclusions, the court then examined the precedents that required the invalidation of the instructions. The court concluded that the pre-existing law governing the due process rights of a defendant to fair instructions informing the jury of the relevant factual issues to be decided was more than specific enough to compel the invalidation of the Illinois murder-voluntary manslaughter instructions in the context of this case. *Id.* at 20-23.

SUMMARY OF ARGUMENT

In deciding that Kevin Taylor was entitled to habeas corpus relief, the Seventh Circuit relied exclusively on legal rules that were well-settled when Kevin Taylor's conviction became final. The court's conclusion that Taylor's due process rights were violated by a procedure that arbitrarily stripped him of his right to present his lone defense did not even minimally advance existing law.

It is undisputed that Kevin Taylor was entitled to an instruction on the theory of his defense in this case and that he was entitled to a jury determination on whether, in light of that defense, he was guilty of murder. Taylor was not guilty of murder if he acted under sudden and intense passion as a result of serious provocation. This was Taylor's lone defense; he acknowledged that he killed Scott Siniscalchi but asked the jury to find that he did so acting under sudden and intense passion. The trial judge ruled that the evidence in support of this defense was strong enough to require an instruction to the jury about Taylor's theory of defense to the murder charge. This ruling stands as the authoritative construction of Illinois law on this point.

It is also undisputed that the instructions that Taylor's jury received completely failed to apprise the jury that it should find Kevin Taylor not guilty of murder if it found that he acted under sudden and intense passion. Quite to the contrary, the murder instructions explicitly told the jury that if it found the elements of murder to exist, it should find Kevin Taylor guilty. The State fully concedes that these instructions arbitrarily deprived Taylor of his right to have his defense considered. The Seventh Circuit also agreed, concluding that the instructions were likely to have led the jury to ignore Taylor's defense.

Both of these points are accepted by everyone in this case. The only question under *Teague*, therefore, is whether the Seventh Circuit relied on a new rule of law when it held that Taylor's due process rights were violated by a trial in which he was arbitrarily deprived of his right to have his factually supported defense considered. The answer to this question is obvious. As the Seventh Circuit readily concluded, a defendant's right to have his side of the case considered by the trier of fact is hardly a

new right; it has been recognized in a long series of cases involving the due process rights of criminal defendants.

The State acknowledges the ancient pedigree of the constitutional rule forbidding jury instructions to arbitrarily withdraw dispositive factual issues from consideration by the trier of fact. Nonetheless, the State argues that this rule applies only to instructions that affect *elements* of an offense and has no effect at all on *affirmative defenses*. According to the State, the Due Process Clause is not implicated here – no matter how unfairly and arbitrarily Taylor was stripped of his right to defend himself – because the deprivation only affected Taylor's right to have his affirmative defense considered. This argument is entirely without merit. The right to due process of law has never been held to turn on whether the gross unfairness in a proceeding relates to an element of an offense rather than an affirmative defense. A raft of holdings are to the contrary. It is, of course, true that this Court has held that the Due Process Clause does not require that a state prove the absence of affirmative defenses *beyond a reasonable doubt*. The point of those cases, however, is that the dictates of due process are *satisfied* without *that* specific requirement being applied to affirmative defenses. Those cases do not even remotely stand for the State's unprecedented contention that a state's adjudication of affirmative defenses is *immune* from due process scrutiny.

ARGUMENT

I. THE SEVENTH CIRCUIT RELIED ON NO NEW RULES IN HOLDING THAT KEVIN TAYLOR WAS ENTITLED TO HABEAS CORPUS RELIEF.

Since *Teague* v. *Lane* was decided, this Court has invoked several different verbal formulations in analyzing what constitutes a "new" rule of law. See *Teague*, 489 U.S. at 301 (a rule is new if it "breaks new ground or

imposes a new obligation on the States" or, put another way, was not "dictated by precedent existing at the time the defendant's conviction became final"); *Penry* v. *Lynaugh*, 492 U.S. 302, 315 (1989) (rule petitioner invoked was not new as petitioner was only asking "to fulfill the assurance upon which" earlier cases were based); *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990) (rule was new when it was "susceptible to debate among reasonable minds"); *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (task is to determine whether a state court considering claim at the time conviction became final "would have felt compelled by existing precedent to conclude that the rule" now invoked was required by the Constitution); *Stringer* v. *Black*, 112 S. Ct. 1130, 1140 (1992) (whether rule is dictated by precedent is an "objective" inquiry not to be governed by whether all lower courts agree). See also *Wright* v. *West*, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring) (if a "proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful"); *id.* at 2499 (Kennedy, J., concurring) (when the "rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule"). Affirming the Seventh Circuit's judgment does not depend on choosing among any of these arguably differing standards, however, because the rules that compel granting Taylor habeas corpus relief are not "new" under any of these formulations.

This case is certainly the easiest *Teague* case this Court has considered and the reason for this is relatively straightforward. This is simply an instance of a lower federal court dutifully applying settled principles of law.

There is, therefore, a significant difference between this case and each of the post-*Teague* cases that have been before this Court. Each of those cases involved a habeas petitioner who relied upon some decision of this Court that was decided after his conviction became final. Not too surprisingly, the Court has often concluded that the intervening Supreme Court decision upon which the petitioner relied constituted a "new rule" and the Court has refused to apply it retroactively.

The reason this conclusion is not overly surprising relates to the nature of this Court's certiorari jurisdiction and the manner in which this Court decides cases. Most of this Court's cases call on the Court to decide rather stark legal questions on particularly debatable points of law, as opposed to more factbound applications of accepted legal principles such as those that dominate the lower courts' dockets. See generally United States Supreme Court Rule 10.1 (outlining criteria for granting certiorari). Moreover, unlike lower courts which seek primarily to apply this Court's settled precedents faithfully, this Court's function calls on it to make more momentous decisions as to new directions that constitutional interpretation should take and to create new rules with some degree of frequency. It is not surprising, then, that the Court often finds that one of its own past decisions interpreting the Constitution created a new rule of law.

This case is on dramatically different footing, though, and there is no reason to approach it with even a slight presumption that Taylor is relying on any new rule of law. Taylor relies on no decisions or legal principles other than those that were firmly in place at the time of his trial. Those principles clearly compel the relief that he seeks and the relief to which the Seventh Circuit ruled he was entitled.

A. It Is Undisputed That The Instructions Were Likely To Have Been Understood As Foreclosing Jury Consideration Of Kevin Taylor's Defense To The Murder Charge.

The jury that convicted Kevin Taylor of murder did so on the basis of instructions that were plainly inaccurate and that thoroughly stripped him of the opportunity to have his defense to murder considered. Taylor was not guilty of murder if he "acted under a sudden and intense passion resulting from serious provocation by * * * [t]he individual killed." Ill. Rev. Stat. ch. 38, ¶ 9-2(a) (1985). This was Taylor's defense. He conceded that he killed Scott Siniscalchi and asked the jury to find that he acted under sudden and intense passion and was therefore not guilty of murder. J.A. 112-121. The trial judge found that Kevin Taylor presented sufficient evidence of sudden and intense passion to require a jury instruction on the theory of his affirmative defense. Hence, the trial judge ruled that he had "to let the Jury decide * * * whether that provocation existed here or did not exist here." J.A. 96. Yet, the instructions that were then given utterly failed to inform the jury that it should find Kevin Taylor not guilty of murder if it concluded that he acted under sudden and intense passion. Indeed, the instructions actually gave the jury the opposite directive – that Kevin Taylor was guilty of murder *even if* he acted under sudden and intense passion.

No one debates these points. To begin with, the State concedes that the instructions "permitt[ed] the jury to find Taylor guilty of murder without considering his affirmative defense." Petr's Br. 12. This concession is consistent with the observations of a unanimous Illinois Supreme Court in *People* v. *Reddick*, 123 Ill. 2d 184, 194, 526 N.E.2d 141, 145 (1988), in which that court explained that one of the flaws in these instructions is that "the

murder instruction makes no mention of the mitigating mental conditions" that act as affirmative defenses to the charge of murder. Therefore, the court continued, "[t]hese instructions *essentially assure*" that the jury will not be able to acquit a defendant of murder, even if one of the defenses to murder is clearly demonstrated. *Id.* (emphasis added).

Similarly, in *Falconer* v. *Lane*, 905 F.2d 1129 (7th Cir. 1990), the Seventh Circuit explained that the murder instructions "read as though" there was no affirmative defense to the murder charge. "No matter how clearly either the State or the defense proved the existence of the mitigating 'manslaughter defenses,' the jury could nevertheless return a murder verdict in line with the murder instruction as given." *Id.* at 1136.

This is not, then, a case about slightly ambiguous instructions that create a slim chance of being interpreted in the manner that the defendant suggests. Quite to the contrary, the instructions were rather clear in telling the jury to ignore Kevin Taylor's defense and to convict him of murder even if he acted under sudden and intense passion. The jury was told that if it found that the State proved the specified elements of murder it must return a verdict of guilty on that charge. And the jury did just that, in complete conformance with the instructions it was given. In light of these instructions and in light of Taylor's own acknowledgment that he was guilty of the *elements* of murder, it is difficult to imagine how a jury possibly could have found him not guilty of murder – even if it was fully convinced that he was acting under sudden and intense passion. As Judge Easterbrook has noted: the instructions at issue here "tell a jury precisely what to do." The problem, of course, is that "they tell the jury the *wrong* thing to do," for a defendant has the right to have his affirmative defenses considered. *Flowers* v.

Illinois Dep't of Corrections, 962 F.2d 703, 709-710 (7th Cir. 1992) (Easterbrook, J., concurring), pet. for cert. filed, 61 U.S.L.W. 3150 (U.S. Aug. 5, 1992) (No. 92-253).

Indeed, the verdict forms that the jury returned confirm that the jury never considered the voluntary manslaughter charge and, hence, never considered Taylor's defense to murder. The jury signed neither the "guilty" nor the "not guilty" form on the voluntary manslaughter charge. See J.A. 135-140 (reproducing forms). This reaction was consistent with the charge which told the jury that it should not return guilty verdicts on both the murder and voluntary manslaughter charges. Once the jury found that Taylor was guilty of the elements of murder – as he concededly was – the jury had no reason to go further. See generally *Flowers*, 962 F.2d 703 (reviewing instructions nearly identical to those here).[8]

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[8] *Flowers* clearly illustrates the extent to which these instructions served to foreclose the jury from considering defenses to murder. The jury in *Flowers* had been given murder-voluntary manslaughter instructions virtually identical to the ones Kevin Taylor's jury heard, except that the jury had not been told that it must not find Flowers guilty of both murder and voluntary manslaughter. Obviously convinced that the facts supporting Flowers' affirmative defense had been proven, the jury returned a guilty verdict on the voluntary manslaughter charge (representing a finding that the elements of murder had been proven but that an affirmative defense also had been proven). Because of the nature of the instructions, however, the jury also returned a guilty verdict on the murder charge. This, of course, was an entirely predictable result because the instructions never explained that proof of sudden and intense passion constituted an affirmative defense to murder and entitled the defendant to a not-guilty verdict on the murder charge. The judge who received these remarkable, obviously inconsistent, verdicts instructed the jury to deliberate further and to return a guilty verdict on either the murder or voluntary manslaughter charge, but not both. (This instruction was similar to the one that Taylor's jury received. J.A. 131). Following this instruction, the jury came back with a murder verdict – even though it had unquestionably already found the presence of an affirmative defense that should have led to an acquittal as to the murder charge.

Flowers is just one of many cases where these instructions led juries to ignore completely an affirmative defense that should have been dispositive. See generally Timothy P. O'Neill, *"With Malice Toward None": A Solution to an Illinois Homicide Quandary*, 32 **DePaul L. Rev.** 107, 118-126 (1983) (discussing other similar cases including one in which the judge tried to clarify the issues for the jurors by telling them that if they find the defendant "guilty of murder, then you don't have to consider the voluntary manslaughter because you have already found her guilty of murder").

The Seventh Circuit's conclusion in *Falconer*, which the court followed here, is compelling: "This is not a case in which the instructions may be described as falling just short of some ideal formulation, or as flawed only if viewed in 'artificial isolation.' They specifically directed the jury that it could return a verdict of murder * * * without making any reference to evidence regarding provocation." 905 F.2d at 1137.

There was certainly nothing "new" about the Seventh Circuit's methodology in reaching this conclusion about the natural import of these instructions. The Seventh Circuit did cite a 1990 decision – *Boyde* v. *California*, 494 U.S. 370, 380 (1990) – for the proposition that it is appropriate for a court to consider " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in' an invalid manner." Pet. App. 21. The citation of *Boyde* was not at all critical to the court's reading of the instructions, however. Rather, the instructions in this case so clearly informed the jury to ignore

Taylor's defense that the court's conclusion was compelled under any of the formulations that this Court has articulated.

Indeed, the *Boyde* "reasonable likelihood" standard that the Seventh Circuit drew from was actually far more sympathetic to the prosecution than any standard the court would have applied had it chosen to cite some of this Court's pre-1987 cases. See *Boyde*, 494 U.S. at 379-380 (discussing various formulations and concluding that the "reasonable likelihood" standard "better accommodates the concerns of finality and accuracy" than the other standards). Certainly, the most widely accepted standard in 1987 would have been even easier for Taylor to satisfy. See *Francis* v. *Franklin*, 471 U.S. 307, 315-316 (1985) (asking what "a reasonable juror *could have* understood the charge as meaning" (emphasis added)). The State can hardly be heard to complain that the Seventh Circuit invoked the "reasonable likelihood" standard instead of one of the more defendant-protective standards that were current in 1987.[9]

B. The Seventh Circuit Relied On No New Rules In Holding That Instructions Which Arbitrarily Foreclose Jury Consideration Of A Defense Violate The Defendant's Right To Due Process Of Law.

Having recognized that the instructions were likely to have led the jury to ignore Kevin Taylor's defense, the Seventh Circuit proceeded to ask whether "instructions

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[9] Had the Seventh Circuit not used the state-protective standard of *Boyde*, the State almost assuredly would now be arguing that it was entitled to have the benefit of *Boyde*.

permitting a jury to reach a murder verdict without considering evidence that would warrant mitigation to voluntary manslaughter (in accordance with a reasonable interpretation of those instructions) violates due process." Pet. App. 22. The court had no difficulty answering this question. It was manifest to the court that the Due Process Clause does not tolerate instructions that arbitrarily "lead the jury to ignore evidence" that would exonerate the defendant of murder. *Id.* This conclusion is plainly correct and clearly entitles Taylor to relief given the finding of the Illinois trial court that he had presented enough evidence in support of his defense to justify an instruction. It is equally plain, moreover, that the Seventh Circuit was not relying on any new rules of law in reaching this conclusion.

The crux of the Seventh Circuit's holding was that the instructions violated Kevin Taylor's right to due process of law because "the jury could not weigh evidence that may have led to an acquittal on the charge of conviction – regardless of whether the evidence related to an element of the crime or an affirmative defense." Pet. App. 23. Just like the instructions in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), the court explained, the instructions here acted as the equivalent of a conclusive presumption or a directed verdict on a dispositive factual issue that Kevin Taylor had the right to have his jury decide. To be sure, the court added, *Connecticut* v. *Johnson* dealt with elements of an offense, while the impairment in this case dealt with an affirmative defense. Nonetheless, the court explained that given the aspect of *Connecticut* v. *Johnson* it was relying upon, this difference amounts to "an insignificant distinction." Pet. App. 23. The court considered it self-evident that decisions relieving the prosecution of the constitutional duty to disprove the defendant's

affirmative defenses beyond a reasonable doubt[10] do not relieve a trial court of its duty to allow the defendant to present his relevant defenses and to allow the jury to consider those defenses. Thus, the court held that the instructions that were given here – much like the instructions that were given in *Connecticut* v. *Johnson* – unconstitutionally deprived the defendant of his right to have the jury make the factual findings critical to the determination of his guilt or innocence with respect to the murder charge.

The Seventh Circuit did not dwell long on the precise nature of the due process violation, as it evidently considered it indisputable that instructions that arbitrarily preclude a jury from considering essential defenses violate due process of law. Yet, because the State now disputes that proposition, it is necessary at this point to provide more thorough documentation for the Seventh Circuit's basic conclusion and to elaborate on the nature of the due process violation that the court identified. Moreover, in order to refute the State's contention that the Seventh Circuit's decision depends on some new rule of law that emerged only after Taylor's conviction became final, this brief establishes the clarity of the constitutional violations referring exclusively to cases decided prior to August 3, 1987 – the date on which Kevin Taylor's conviction became final. As this analysis reveals, the unconstitutionality of Kevin Taylor's conviction was as obvious on that date as it is today.

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[10] Earlier in its decision, the panel had recognized that the United States Constitution does not require the prosecution to bear the burden of disproving affirmative defenses beyond a reasonable doubt. Pet. App. 12-16.

1. The Due Process Right That Taylor Asserts Was Clearly Established On The Date His Conviction Became Final.

This Court has often stressed the basic constitutional nature of a defendant's right to present a defense. In *In re Oliver*, 333 U.S. 257, 273 (1948), for example, the Court described the right of an individual to "be heard in his defense – a right to his day in court" as one of the most "basic" ingredients of due process of law. In *Washington* v. *Texas*, 388 U.S. 14, 19 (1967), the Court similarly explained that "the right to present a defense" is a "fundamental element of due process of law." This right has been held to include the right to present evidence going to the issue of guilt (see *Chambers* v. *Mississippi*, 410 U.S. 284 (1973)); the right to present evidence relevant to sentencing (*Green* v. *Georgia*, 442 U.S. 95 (1979)); and the right of a defendant to testify in his or her own behalf (see *Rock* v. *Arkansas*, 483 U.S. 44 (1987)). See also *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (discussing constitutional guarantee of a "meaningful opportunity to present a complete defense" and "an opportunity to be heard"). All of these rights are designed to ensure a fair procedure at which the defendant is allowed to present his side of the case – whether his side relates to refuting an element of the offense or to establishing a relevant affirmative defense. See *Webb* v. *Texas*, 409 U.S. 95, 98 (1972) (reversing conviction based on state judge's interference with the defendant's right "to present his own witnesses to establish a defense"). See generally Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 **Ind. L. Rev.** 713 (1976).[11]

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[11] Even in the civil context, the Court has held repeatedly that due process carries with it a basic right "to be heard." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Boddie* v. *Con-*

The right to *present* a defense carries with it, of course, the right to have the trier of fact *consider* the proffered defense. Thus, in *Cool* v. *United States*, 409 U.S. 100 (1972), Marilyn Cool's defense turned on the testimony of one Robert Voyles, her alleged accomplice. At Cool's trial, Voyles testified that he alone was guilty of the crime charged and that Cool had nothing to do with the crime. The trial judge gave the jury an "accomplice instruction" which provided that accomplice testimony is "open to suspicion" but that if the jury is convinced that Voyles's testimony "is true beyond a reasonable doubt, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime." *Id.* at 102. In reversing Cool's conviction, this Court held that this instruction concerning one of the defense witnesses violated, among other rights, the defendant's rights to present evidence as recognized in *Washington* v. *Texas*. The Court explained that the "instruction given below impermissibly obstructs the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable." 409 U.S. at 104.

If the right to present witnesses and a defense was violated in *Cool*, it was violated with a vengeance in this case. In *Cool*, the jury at least was given the opportunity to consider the exculpatory evidence, so long as it found the evidence "extremely reliable." Here, by contrast, the jury was told that Kevin Taylor's evidence of sudden and intense passion – evidence which he presented through his own testimony and that of other defense witnesses –

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necticut, 401 U.S. 371, 380 (1971); *Baldwin* v. *Hale*, 1 Wall. (78 U.S.) 223, 233 (1863). As the Court explained in *Logan*: this right requires "an opportunity • • • granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case." *Logan*, 455 U.S. at 437 (citations omitted).

had no effect on the charge of murder. As the late Professor James Haddad, a member of the Illinois Pattern Jury Instruction Committee from 1974 through 1991 (and Chairman of the Committee for many of those years) wrote: a court delivering the Illinois instructions on murder-voluntary manslaughter "tells the jury, in effect, that the lawyers were wrong in suggesting that proof of murder turns upon what the evidence shows with respect to passion-provocation." James B. Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach*, 59 **Chi.-Kent L. Rev.** 23, 31 (1982).

It is difficult to imagine a more dramatic impairment of the right to present a defense. It does a defendant no good to have the right to testify and present witnesses that prove a defense, if he has no right to have his trier of fact instructed that the defense exists as a matter of law. The Constitution has not been read to create such pyrrhic rights. "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Washington* v. *Texas*, 388 U.S. at 23. See also *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) (trial court's limiting instructions on mitigation evidence violated defendant's right to present mitigating evidence and to have it considered). As this Court held in *Spurr* v. *United States*, 174 U.S. 728, 735 (1899), when a defendant is "entitled to the full benefit of [a] defense," it is "vital" that the jury be properly instructed. See also *United States* v. *Bailey*, 444 U.S. 394, 415-416 (1980) (discussing right to instruction on theory of defense where evidence supports it); *Hickory* v. *United States*, 160 U.S. 408, 423 (1896) ("When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially."). The Ninth Circuit was, therefore, clearly correct when it observed that "a failure to instruct

the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed • • • will entitle the defendant to a judgment of acquittal." *United States* v. *Escobar de Bright*, 742 F.2d 1196, 1201-1202 (9th Cir. 1984).

There can be no doubt about the constitutional implications of failing to instruct a jury on a defense that is supported by the evidence. This Court has often repeated that the Constitution forbids the entry of a directed verdict against a defendant in a criminal proceeding. *United States* v. *Martin Linen Supply Corp.*, 430 U.S. 564, 573 (1977); *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408 (1947); *Sparf & Hansen* v. *United States*, 156 U.S. 51, 105-106 (1895). Yet, this is almost precisely what happened in this case. Kevin Taylor took the stand and admitted to having killed Scott Siniscalchi. His only defense was that he acted under sudden and intense passion, and the state court ruled that he had presented sufficient evidence to entitle him to a jury determination on that issue. However, the trial court delivered an instruction that told the jury to convict Taylor of murder so long as the elements of the offense were present – whether or not the killing was the result of sudden and intense passion. This instruction had the precise effect of a directed verdict for the prosecution and deprived Kevin Taylor of his right to have a jury make the factual determinations that would resolve whether he was guilty of murder. See generally *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980).[12]

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[12] In *Hicks*, this Court held that the defendant was constitutionally entitled to be sentenced by an Oklahoma jury, even though the Sixth Amendment does not itself require jury sentencing. The Court explained that where

> a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, • • • and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. • • • In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

Hicks, 447 U.S. at 346. Just as in *Hicks*, it is clear that Illinois law provided Kevin Taylor with "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury." *Id.* See Ill. Rev. Stat. ch. 38, ¶ 115-1 (1985). This state-created liberty interest in trial by jury provides yet further support for the due process right that is the predicate for Taylor's habeas corpus relief.

Indeed, long before Kevin Taylor was tried, this Court had found violations of the right to present a defense based on far weaker interferences with a defendant's right to have a jury decide his guilt or innocence. In *Quercia* v. *United States*, 289 U.S. 466 (1933), this Court reversed a conviction because the trial judge had commented on the evidence in a manner which, the Court feared, was likely to preclude the jury from engaging in "a fair and dispassionate consideration of the evidence." *Id.* at 472. See also *Hopt* v. *Utah*, 110 U.S. 574, 583 (1884) ("prisoner had the right to the judgment of the jury upon

the facts, uninfluenced by any direction from the court as to the weight of evidence").

Similarly, this Court often has recognized that instructions which the jury may construe as conclusive presumptions unconstitutionally interfere with a defendant's right to due process of law. See *Connecticut* v. *Johnson*, 460 U.S. 73, 84 (1983) (plurality opinion) (conclusive presumption "is the functional equivalent of a directed verdict on that issue"); *Sandstrom* v. *Montana*, 442 U.S. 510, 523 (1979) (instruction that included presumption "invaded [jury's] factfinding function"); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 446 (1978) (same); *Morissette* v. *United States*, 342 U.S. 246, 274 (1952) ("so long as the functions of the judge and jury are distinct * * * neither can invade the province of the other without destroying the significance of trial by court and jury").[13]

The law has long been clear that the Due Process Clause does not tolerate conclusive presumption instructions that serve to "shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue." *Mobile, J. & K.C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43 (1910). When a statutory scheme makes some factual issue dispositive to

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[13] Because these specific cases (*Johnson*, *Sandstrom*, *United States Gypsum* and *Morissette*) dealt with elements of an offense, the presumptions at issue there violated not only the right to present a defense but also the right to require the prosecution to prove each element of the offense beyond a reasonable doubt. As the Seventh Circuit noted, the right to proof beyond a reasonable doubt is not at issue with respect to Taylor's affirmative defenses. This fact, however, does not erase the impact that these instructions have on other constitutional rights implicated by the jury's constitutional role and the defendant's right to have his case decided on its facts. Pet. App. 23.

the proper resolution of a case – as Illinois law clearly does with respect to the affirmative defense of sudden and intense passion – "the State may not, consistently with due process, eliminate consideration of that factor in its * * * hearing." *Bell* v. *Burson*, 402 U.S. 535, 541 (1971).

Here, the jury was not merely subject to some judicial comment *frowning* upon the defense or to some presumption that *may* have been taken as conclusive; the jury was given an instruction that totally removed the defense from its consideration of the murder charge. The Seventh Circuit broke no new ground in holding that this error was of constitutional magnitude. Its holding followed, *a fortiori*, from many of this Court's and federal courts of appeals' earlier decisions. *Cf. Stringer*, 112 S. Ct. at 1136 (to the extent that the differences between the recent decision and the old law were significant, they suggest that application of the old principle to these facts "follows, *a fortiori*").

It is this very essence of due process – the right to present a relevant defense and have that defense considered – that forms the basis of the federal courts of appeals' recognition that a defendant's right to due process of law may be violated when a state court fails to instruct the jury on a theory of defense that has factual support. For example, in *United States ex rel. Means* v. *Solem*, 646 F.2d 322 (8th Cir. 1980), the state trial court had refused to give the jury an instruction on the defendant's theory of self-defense. In granting habeas corpus relief, the Eighth Circuit explained that *"[i]t is well established* that a defendant in a criminal case is entitled to an instruction on his theory of the case if there is evidence to support it." *Id.* at 328 (emphasis added). When such an instruction is improperly denied, the court explained, a habeas corpus petitioner is entitled to relief if he can demonstrate a "fundamental defect which inherently

results in a complete miscarriage of justice (or) an omission inconsistent with rudimentary demands of fair procedure." *Id.* (citation omitted). In *Means*, the court concluded (much as the Seventh Circuit did in this case) that the "omission of the requested instruction on self-defense and defense of others 'evaluated in light of the totality of the circumstances' so infected the 'entire trial that the resulting conviction violates due process.' " *Id.* at 332 (citations omitted). See also *Escobar de Bright*, 742 F.2d at 1201 ("[t]he right to have the jury instructed as to the defendant's theory of the case is one of those rights * * * basic to a fair trial").

Many other cases from a variety of circuits have applied this rule in assessing whether a state trial court's or a federal district court's refusal to provide an instruction on a critical defense violated a defendant's right to due process of law. See, *e.g*, *United States* v. *Hicks*, 748 F.2d 854, 857-858 (4th Cir. 1984); *United States* v. *Middleton*, 690 F.2d 820, 826 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); *United States ex rel. Peery* v. *Sielaff*, 615 F.2d 402 (7th Cir. 1979), cert. denied, 446 U.S. 940 (1980); *Zemina* v. *Solem*, 573 F.2d 1027 (8th Cir. 1976); *Strauss* v. *United States*, 376 F.2d 416, 418-419 (5th Cir. 1967). As the Fifth Circuit held in *Strauss*:

> It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of the defense for which there is any foundation in the evidence. * * * The judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that

> defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge *directs a verdict on that issue against the defendant*.[14] * * * A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge.

376 F.2d at 418-419 (some emphasis added). See also *United States* v. *Hicks*, 748 F.2d at 857-858 ("Once it appeared that there was sufficient alibi evidence to permit the factfinder to pass on the issue, Hicks had a Sixth Amendment and due process right to have that issue submitted to a jury."); *Peery*, 615 F.2d at 404 ("Since the result is trial by the judge, rather than trial by a jury, both Sixth Amendment and Due Process rights may be at issue."); *United States* v. *Blair*, 456 F.2d 514, 520 n.5 (3d Cir. 1972) (where failure to instruct materially implicates the defense's arguments it can "amount to undermining the jury's ability to find for the defense on these points").

Similarly, state courts routinely have recognized that a defendant has a constitutional right to an instruction on a defense theory that has factual support. As the Connecticut Supreme Court has explained: "A fundamental element of due process is the right of a defendant charged with a crime to establish a defense. * * * This fundamental constitutional right includes proper jury instructions on the elements of [the] defense." *State* v. *Miller*, 186 Conn. 654, 660-661, 443 A.2d 906, 909 (1982) (citing *Washington* v. *Texas*). See also, *e.g.*, *Allen* v. *Nevada*, 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981); *Naugher* v. *State*, 685 P.2d 37, 41 (Wyo. 1984). The law on this point was well-settled long before 1987.

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[14] This, of course, is the same analogy that this Court drew in *Connecticut* v. *Johnson*, 460 U.S. at 84, which the Seventh Circuit relied upon. Pet. App. 22-23.

Of course, the right to present a relevant defense and to have that defense considered does not entitle a defendant to a defense instruction where there is insufficient evidence to support it. As the Court explained in *United States* v. *Bailey*, 444 U.S. 394, 416 (1980):

> [t]he requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as the judge of credibility. * * * On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses.

In this case, though, the Seventh Circuit was not reviewing a state court determination that a defendant failed to meet a minimum burden of production to justify a defense instruction. Quite to the contrary, the Seventh Circuit was following the finding of the trial judge that Kevin Taylor *had* presented enough evidence to justify the instruction (J.A. 96, 101), and that the dispositive factual issue thus presented could only be resolved by the jury. Pet. App. 24.[15] The problem is that the instructions given utterly failed to apprise the jury of the conclusion that the trial judge had properly reached.

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[15] This case does not, therefore, call into question the level of deference that a federal court should afford to a state court which has determined that no defense instruction is warranted by the evidence. The determination of whether evidence in support of a defense is sufficient to sustain the defense is a matter of state law and it is not typically the province of a federal court to declare that a state court has erred in applying state law. See generally *Bagby* v. *Sowders*, 894 F.2d 792, 794-795 (6th Cir. 1990) (en banc), cert. denied, 496 U.S. 929 (1990).

It is for precisely this reason that the flawed instructions produced more than just infringements of the right to present a defense and to have that defense considered fairly. In addition, the instructions here turned Kevin Taylor's trial into an arbitrary and irrational proceeding in a way that surely violated the Due Process Clause as it has long been understood by this Court. The Court has often proclaimed that "the touchstone of due process is the protection of the individual against arbitrary action of government." *Ponte* v. *Real*, 471 U.S. 491, 495 (1985) (citations omitted). See also *Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979) (the "most elemental of Due Process rights" is the "freedom from a wholly arbitrary deprivation of liberty"). In this case the trial judge, at one moment, held that the defendant was entitled to have the jury consider his defense to murder. Then, at the next moment, the trial court instructed the jury not to consider that defense in reaching a verdict on the murder charge. Perhaps some murder defendants are lucky enough to have individuals on their jury who are sufficiently versed in the law (or sufficiently cavalier about their responsibility as jurors) to ignore the literal terms of the instructions and to consider the issue of sudden and intense passion as a defense to murder.[16] Making Kevin Taylor's right to have

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[16] The law presumes, of course, that the jury followed the instructions. See *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987). As the Seventh Circuit explained in *Falconer*, 905 F.2d at 1136-1137:

> If read to a jury composed of lawyers, this set of instructions probably could not produce the faulty hypothetical murder verdict complained of since the elements of voluntary manslaughter were stated. But the reasoning that could produce such a faulty verdict by a lay jury was unmistakably left open in instructions given by the presiding judge at trial. We must presume that the jury was not already schooled in distinctions between murder, voluntary manslaughter, and justifiable self-defense – or even the general concept of lesser-included offenses.

his defense considered dependent on that kind of fortuity is the epitome of a procedure which makes an individual's liberty turn on wholly arbitrary circumstances. Certainly, no one can say that a process which precludes a defendant from having his valid defense to a murder charge considered comports with the "fundamental notions of fairness" that define due process of law. *Chaffin* v. *Synchcombe*, 412 U.S. 17, 25 (1973).[17]

The Seventh Circuit recognized that a defendant may not secure habeas corpus relief simply because the instructions that were given at his state trial were "undesirable, erroneous, or even universally condemned." *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). See Pet. App. 20; *Falconer*, 905 F.2d at 1135. Nor is a defendant entitled to have a federal court substitute its judgment for a state

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[17] Although the right to be free from wholly arbitrary deprivations of liberty is necessarily a general one, its generality does not mean that every routine application of the standard to differing fact patterns qualifies as a new rule under *Teague*. As Justice Kennedy observed recently:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that these applications themselves create a new rule. * * * Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result too novel that it forges a new rule, one not dictated by precedent.

Wright v. *West*, 112 S. Ct. 2482, 2499 (1992) (Kennedy, J., concurring). If reasonable jurists would all agree (on the date that the conviction became final) that the proceeding violated the Due Process Clause, the State has no legitimate reliance interest deserving of protection under *Teague*. It is not essential that all reasonable jurists agree on a precise articulation of the right in question.

court determination that the defendant failed to present enough evidence to support the requested defense instruction. See *Peery*, 615 F.2d at 404. What a habeas corpus petitioner is entitled to, however, is a federal determination of whether his right to present a defense has been arbitrarily foreclosed in a manner that amounts to a "complete miscarriage of justice [or] an omission inconsistent with rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962).[18]

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[18] The instructional error in this case was particularly severe because of the nature of the defense that Kevin Taylor presented. This was not a case in which the defendant's proposed instruction merely served to accentuate the defendant's attack on the prosecution's case-in-chief. This was not, for example, a defendant asking for an "alibi instruction" as part of an effort to rebut the state's claim that the defendant committed the criminal act. (An alibi instruction informs the jury that, in order to gain an acquittal, the defendant need not prove an alibi defense but need only raise a reasonable doubt as to his or her presence at the scene of the crime. See *United States* v. *Burse*, 531 F.2d 1151, 1153 (1976)). In that type of case, even if the defendant's proposed instruction is omitted, the jury is still told that it has to find that the defendant committed the criminal act. The proposed alibi instruction can be treated as somewhat superfluous, therefore, because the jury instructions, taken as a whole, require the jury to find the relevant element. See *Jones* v. *Kemp*, 794 F.2d 1536, 1540-1541 (11th Cir.) (the trial court "gave proper instructions on the elements of the crime and burden of proof, and Jones has demonstrated no prejudice from the absence of a specific alibi instruction"), cert. denied, 479 U.S. 965 (1986).

Here, by contrast, the missing instruction about Kevin Taylor's defense to the murder charge was not at all superfluous. In the absence of a jury charge that sudden and intense passion constitutes a defense to murder, the issue of whether Taylor had acted under sudden and intense passion would never have been considered by the jury as part of the murder charge. Taken as a whole, the instructions on murder amounted to a grievous "mis-

It is evident, then, that on August 3, 1987 – the date on which Kevin Taylor's conviction became final – it was a clearly established rule that a defendant who presents sufficient evidence to support a relevant defense has a fundamental constitutional right to present evidence relating to that defense and to have it considered by the trier of fact. No reasonable interpretation of precedent could have led to any other conclusion and the Seventh Circuit broke no new ground in recognizing the precept. See *Stringer*, 112 S. Ct. at 1140; *Butler*, 494 U.S. at 415. The question to be asked is not whether the Seventh Circuit's decisions in *Falconer* and in this case were the first *applications* of these rules to the particular murder and voluntary manslaughter instructions at issue here.[19] Whether or not the instructions at issue here were routinely applied in Illinois is not relevant. See *Penry*, 492 U.S. 302 (1989). The question is whether the Seventh Circuit relied upon any new legal principles that would not have been considered "by a state court considering petitioner's claim at the time his conviction became final." *Sawyer* v. *Smith*, 497 U.S. 227, 237 (1990). Clearly, it did not.

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statement of the law" as they totally negated the concededly relevant defenses to murder. *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977).

[19] It was this misguided approach to the *Teague* inquiry that led the District Court to rule that Taylor was seeking to invoke a new rule. The court recognized that Taylor was not invoking any new legal principles, but the court was nonetheless moved by the fact that these principles had not yet been applied to the Illinois jury instructions by the time Taylor's conviction became final. Pet. App. 31-32.

2. The Well-Established Right To Have One's Defense Considered Has Nothing To Do With Any Open Questions Relating To A Defendant's Right To A Lesser Included Offense Instruction.

Throughout its brief, the State has sought to create an impression of uncertainty in the law by conflating the well-established right to present a relevant defense with the very different question of whether a defendant in a non-capital state case is constitutionally entitled to have his jury instructed on a lesser included offense. See Petr's Br. i, 17, 25, 27. The due process right that the Seventh Circuit relied upon, however, has nothing to do with any purported right to instructions on lesser included offenses.

When a state court denies a defendant a lesser included offense instruction it is, in no way, limiting the defendant's ability to present his defense to the crime with which he was charged. With or without the lesser included offense instruction, the defendant is given every opportunity to persuade the jury and the jury has every opportunity to decide that the defendant is not guilty of the elements of the offense or has an affirmative defense to the charged crime. The defendant seeking a lesser included offense instruction thus wants more than the opportunity to prove that he is innocent of the crime charged. Namely, he wants the jury to be given "a less drastic alternative than the choice between conviction of the offense charged and acquittal." *Beck* v. *Alabama*, 447 U.S. 625, 633 (1980). In *Beck*, the Court held that a defendant in a capital case is entitled to such an instruction. This Court has never squarely decided, however, whether a defendant is constitutionally entitled to this sort of instruction in a non-capital case (see *id.* at 638 n.14), and

this question has been the subject of some disagreement among the courts of appeals. See Petr's Br. 17 n.7.

Kevin Taylor is not claiming that his jury should have been given "less drastic alternatives" so that he might have had a better practical chance of securing an acquittal. Rather, he is asking for the core right to try to convince the jury that he is innocent of murder. As the State recognizes at many points in its brief, this is a case about an opportunity to present an affirmative defense to murder and to have that defense considered – not about a right to force the State to charge a defendant with manslaughter. See, *e.g.*, Petr's Br. 12 (conceding that instructions permitted "jury to find Taylor guilty of murder without considering his affirmative defense"); *id.* at 16 (claiming that "a state has no constitutional obligation to permit defendants to plead and prove affirmative defenses"); *id.* at 19-20 (instructional error here "potentially removed an affirmative defense from the jury's consideration"); *id.* at 23 ("an accused has no constitutional right to an affirmative defense instruction"). The uncertainty about the applicability of *Beck* to non-capital cases casts no clouds on the clarity of the basic right to present a defense that Taylor is asserting.

3. The Error Here Severely Lessened The Likelihood Of An Accurate Conviction And Therefore Qualifies Under The Second *Teague* Exception.

Given the nature and severity of the constitutional violation here – it totally deprived Kevin Taylor of his right to defend himself against the State's murder charge – this case qualifies under the second exception to *Teague*. Thus, even if this Court were to conclude that the Seventh Circuit somehow relied on a new rule of law, Kevin Taylor would still be entitled to habeas corpus relief.

In *Teague*, the plurality held that even new rules must be applied retroactively when they involve "procedures without which the likelihood of an accurate conviction is severely diminished." 489 U.S. at 313. This exception is designed to cover new rules of criminal procedure "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495. The right to present a defense – be it an attack on an element or an affirmative defense – surely qualifies under these standards.

Of course, as Justice O'Connor noted in *Teague*, "[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." 489 U.S. at 313. This observation is surely accurate and fortifies Kevin Taylor's claim that his plea for basic due process is not predicated on any new rule of law. However, in the event that the Court concludes that Taylor is seeking the benefit of some new rule, it should recognize the right to present a defense as a procedure "without which the likelihood of an accurate conviction is severely diminished." *Teague*, 489 U.S. at 313. In either case, Taylor is entitled to relief.

II. THE STATE'S CLAIM THAT THE DUE PROCESS CLAUSE HAS NO BEARING ON AFFIRMATIVE DEFENSES IS PLAINLY WRONG.

The State cannot defend the accuracy or the fairness of the jury instructions in this case, and it has not attempted to do so. Indeed, the State concedes that Taylor's instructions contravened Illinois law on murder and voluntary manslaughter by "permitting the jury to find Taylor guilty of murder without considering his affirmative defense." Petr's Br. 12. Nonetheless, the State claims

that Kevin Taylor's constitutional rights were not violated because, the State asserts, the fairness of the manner in which states adjudicate affirmative defenses is not subject to "scrutiny under the Due Process Clause." *Id.* at 16. According to the State, state procedures relating to affirmative defenses – no matter how unfair and no matter how arbitrary – do "not implicate the Due Process Clause because a state has no constitutional obligation to permit defendants to plead and prove affirmative defenses like manslaughter in the first place." *Id.* The State's rather startling contention that the Due Process Clause has nothing to say about affirmative defenses is plainly wrong.

The State's argument relies wholly upon the "bitter with the sweet" rationale which this Court has rejected time and again. The State contends that Kevin Taylor must take the bitter – a proceeding in which he had no right to have the jury consider his factually supported defense – with the sweet – Illinois' willingness to create an affirmative defense that it was not constitutionally compelled to recognize. As Justice White wrote for the Court, however, in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 541 (1985):

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. *If a clearer holding is needed, we provide it today.* The point is straightforward: the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology.

(emphasis added). See also *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Vitek* v. *Jones*, 445 U.S. 480, 491 (1980).

The Court's strong proclamation in *Loudermill* is directly controlling here. Illinois may not have had to create any affirmative defenses to murder, but once it did, it created a liberty interest that the Constitution most assuredly protects.[20] Under Illinois law, any person who is guilty of murder can be sentenced to up to forty years in prison. Ill. Rev. Stat. ch. 38, ¶ 1005-8-1(a)(1)(a) (1985).[21] If the person acted under a sudden and intense passion, however, he is not guilty of murder and can be sentenced to a maximum of fifteen years. Ill. Rev. Stat. ch. 38,

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[20] The State argues that "[i]t would make little sense to reason that the Due Process Clause permits states to abolish the manslaughter affirmative defense altogether, * * * but still hold that when a state nonetheless permits a jury to consider manslaughter, the Due Process Clause requires that it do so with accurate instructions." Petr's Br. 18. As the Court suggested in *Logan*, however, this result is not at all anomalous. When a legislature seeks to create general legal rules (such as enacting a murder statute with no affirmative defenses), the *legislative process* "provides all the process that is due." *Logan*, 455 U.S. at 433 (citing *Bi-Metallic Investment Co.* v. *State Bd. of Equalization*, 239 U.S. 441, 445-446 (1915)). This legislative process provides significant protection of individual rights because the legislature will, in many cases, find it politically impossible to enact a measure that it may constitutionally be allowed to enact (such as a murder statute with no affirmative defenses). On the other hand, when the legislature has created a general rule creating an entitlement (such as an affirmative defense to a murder statute), the Due Process Clause requires that each individual be given a fair opportunity to prove his eligibility for that right.

[21] If aggravating circumstances are present, the individual can be sentenced to an extended term, natural life, or death. See generally Ill. Rev. Stat. ch. 38, ¶ 1005-8-1 (1985); Ill. Rev. Stat. ch. 38, ¶ 9-1 *et seq.* (1985).

¶ 1005-8-1(a)(4) (1985). Although the state has the option of not creating this significant liberty interest, "it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Loudermill*, 470 U.S. at 541.

Hicks v. *Oklahoma*, 447 U.S. 343 (1980), applies this principle in the setting of a criminal trial. In *Hicks*, the State of Oklahoma made the same argument that Illinois makes today. Oklahoma argued that because it was under no constitutional duty to require jury sentencing, depriving a defendant of his right to jury sentencing was denying him a "right of exclusively state concern." *Id.* at 346. The Court rejected this argument forcefully. Once Oklahoma chose to create a right to jury sentencing, the Court explained, it created a "substantial and legitimate expectation" that a defendant "will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Id.* "[T]hat liberty interest", the Court concluded, "is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Id.*[22]

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[22] Justice Scalia's observation in *McKoy* v. *North Carolina*, 494 U.S. 433, 459-460 n.1 (1990), suggests that the position the State is taking here is so out of step with this Court's decisions that it is "implausible that [the Court] would entertain it on its merits." As he explained:

> *Whether or not* Maryland law could constitutionally require unanimity [by a jury in finding mitigating factors in a capital sentencing], the Court of Appeals authoritatively determined that it did not do so; and a death sentence based on an erroneous instruction to that effect would have to be set aside. * * * [Instructions] violate the Due Process Clause if they misstate the law to the defendant's detriment – and it is not essential to that violation that the law as misstated be an unconstitutional law. Thus, to take the most extreme example, if state law, as authoritatively interpreted by the State's Supreme Court, does not authorize the death penalty for a certain offense, the Due Process Clause would not permit a state trial court to impose it. * * * See *Hicks* v. *Oklahoma* * * * (where state law requires jury sentencing, state courts may not enforce sentence not imposed by jury).

(dissenting opinion) (emphasis in original).

In addition, quite aside from the liberty interest created by state law, Kevin Taylor had a natural liberty interest in his freedom from incarceration. See *Vitek*, 445 U.S. at 491-494; *Morrissey* v. *Brewer*, 408 U.S. 471, 480-484 (1972). Twenty years of his life depended on his opportunity to present his case to the jury and he clearly suffered "grievous loss" by virtue of the grossly unfair procedure through which he was deprived of that opportunity. *Morrissey*, 408 U.S. at 481 (quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

The State ignores these long lines of cases and seeks to rely instead on this Court's decision in *Patterson* v. *New York*, 432 U.S. 197 (1977), and its progeny, to support the contention that the Due Process Clause has nothing to say about the manner in which states adjudicate affirmative defenses.[23] The State's reading of *Patterson* is patently specious.

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[23] The logic of the State's "bitter with the sweet" argument necessarily would immunize even the adjudication of elements from due process scrutiny unless the element is one that the state is somehow constitutionally compelled to include within its definition of a crime. This is basically the reform urged by Judge Easterbrook's concurring opinion in *Flowers*, 962 F.2d at 707-712, in which he followed *Falconer* and *Taylor*, but expressed some reservations about their rationale. Contrary to the State's claim, however, Judge Easterbrook's position reflects no uncertainty in the settled law as of 1987.

The issue before the Court in *Patterson* was not *whether* the Due Process Clause applies to affirmative defenses, but rather *which* procedural protections the Due Process Clause requires with respect to the adjudication of affirmative defenses. In *In re Winship*, 397 U.S. 358

Consistent with the view he first expressed in *Cole* v. *Young*, 817 F.2d 412, 435-444 (7th Cir 1987) (Easterbrook, J., dissenting), Judge Easterbrook proposed a new way of analyzing due process attacks on state convictions. As he put it in *Flowers*: "I offer a suggestion." 962 F.2d at 711. The suggestion that he offered, however, amounts to a rather radical transformation of this Court's due process jurisprudence as it would ignore state law definitions of crimes altogether and ask only whether the Federal Constitution would allow the state to define the crime without the element or the defense upon which the habeas corpus attack focuses. As we have explained, and as Judge Easterbrook concedes, this approach is inconsistent with the settled law in this area. See *Cole*, 817 F.2d at 438 (discussing this Court's holdings and commenting that "[a] regime that makes substance turn on nomenclature has little to recommend it"). See generally Frank Easterbrook, *Substance and Due Process*, 1982 **Sup. Ct. Rev.** 85, 85 (arguing that "[a] Court that protects the legislative power to define substantive entitlements ought to give it control of process as well").

Concurrences and dissents serve important purposes when they advocate major theoretical reassessments of settled legal principles. They do not, however, demonstrate uncertainty in the settled law or show that reasonable jurists differ in interpreting the dictates of settled law. In any event, even if Judge Easterbrook did disagree with the conventional reading of this Court's precedents that we have discussed, that fact would not be determinative of whether the Seventh Circuit's decision here was reasonably compelled by precedent. See *Stringer*, 112 S. Ct. at 1140 (1992) (the fact that Fifth Circuit did not believe that the result was compelled by precedent was not dispositive; "[t]he short answer * * * is that the Fifth Circuit made a serious mistake."); *Penry*, 492 U.S. at 314-319 (holding that petitioner was not relying on new rule even though four Justices dissented on the merits of his claim).

(1970), the Court had held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. And in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the Court had held that this burden of proof requirement extends to every element of a criminal offense. These holdings did not, however, necessarily impose the same requirement with respect to the prosecution's efforts to negate an affirmative defense. The Court had often recognized that "due process is flexible and calls for such procedural protection as the particular situation demands" (*Morrissey*, 408 U.S. at 481), and the Court's task in *Patterson* was to decide exactly *how much process is due* with respect to affirmative defenses. In answering that question the Court never came close to holding that the Due Process Clause has no application to affirmative defenses; rather the Court applied due process analysis to New York's method of dealing with affirmative defenses and concluded that due process was satisfied.

Indeed, far from holding that state adjudications of affirmative defenses are immune from due process scrutiny, the Court in *Patterson* went to pains to point out that New York had fairly administered the affirmative defense in a way that satisfied the dictates of the Due Process Clause. The Court explained that "[h]ere, *the jury was instructed in accordance with the statute* * * * . [C]learly the evidence failed to convince the jury that Patterson's affirmative defense had been made out." 432 U.S. at 206 (emphasis added). Similarly, in *Martin* v. *Ohio*, 480 U.S. 228 (1987), the Court reaffirmed *Patterson*'s holding with respect to the state's not having to carry the burden of proof in negating self-defense, but the Court stressed once again that the defendant "*had the opportunity under state law and the instructions given* to justify the killing and

show herself to be blameless by proving that she acted in self-defense." *Id.* at 233 (emphasis added).

It is clear, then, that *Patterson* and its progeny actually support the claim upon which the Seventh Circuit granted habeas corpus relief. The Seventh Circuit followed *Patterson* and its progeny faithfully when it held that *Patterson* forecloses any argument that Taylor was constitutionally entitled to have the State bear the burden of disproving his affirmative defense.[24] Pet. App. 12-16. The Court was just as faithful to *Patterson*, however, when it held that *Patterson* does not undermine Taylor's claim that he had the right to have a fair opportunity to be heard on his affirmative defense. See generally Ronald J. Allen, *The Restoration of In Re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 **Mich. L. Rev.** 30, 45 n.60 (1977) (explaining that *Patterson* does not immunize affirmative defenses from constitutional scrutiny). As the Seventh Circuit had earlier held in *Falconer*:

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[24] As part of its effort to portray disagreement among lower courts prior to the Seventh Circuit's decision, the State repeatedly confuses the state-law burden of proof issue that was the primary basis of *People* v. *Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), with the federal due process principle that the Seventh Circuit relied upon. The State asserts, for example, that "[s]ince *Reddick*, federal and state courts, including the Seventh Circuit as well as the Illinois Supreme Court, have issued markedly inconsistent opinions as to whether *Reddick* errors violate the Due Process Clause." Petr's Br. 28; see generally *id.* at 28-30. As the Seventh Circuit made clear, however, it was *not* basing its relief on the burden of proof error identified in *Reddick* because it concluded that *Reddick* was not a constitutional decision. Any debate about the constitutional status of *Reddick* is, therefore, of absolutely no significance to this case. Taylor's action depends on his right to have the jury consider his defense – not on the question of who must bear the burden of proving or disproving it.

> The State misinterprets the petitioner's argument when it cites United States Supreme Court precedent for the proposition that, as a matter of constitutional law, the burden of proof as to an affirmative defense may be placed on either the defendant or the state. This case does not turn upon the presumption and burden of proof questions as were presented in such cases as *Mullaney*, * * * *Patterson*, * * * or *Martin* * * * . The hardship for the petitioner in this case is that even though the judge properly decided that the jury should consider a verdict of voluntary manslaughter, the jury may have been left with the false impression that it could convict the petitioner of murder even if she possessed one of the mitigating states of mind described in the voluntary manslaughter instruction. No matter which side carried the burden of proof on any particular element or defense, there can be no question that a murder verdict would have been improper if the jury had found one of the mitigating mental states.

Falconer, 905 F.2d at 1136.

The State's discussion of *Engle* v. *Isaac*, 456 U.S. 107 (1982), is plagued by this same basic confusion between the question of whether the Due Process Clause applies and the very different question of how much process is due. See Petr's Br. 18. In *Engle*, this Court simply reaffirmed *Patterson*'s holding that "the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime." 456 U.S. at 120. Therefore, the Court held, because absence of self-defense was not an element of the crime of murder in Ohio, the Due Process Clause of the United States Constitution did not require the state to prove absence of self-defense beyond a reasonable doubt.

In so holding, *Engle* ruled that Ohio could statutorily take upon itself the procedural burden of proving absence of self-defense beyond a reasonable doubt without transforming any violation of that state procedural law into a violation of due process. *Engle*, 456 U.S. at 121. This conclusion flows directly from the substance-procedure distinction that provides the foundation of this Court's due process jurisprudence. The first part of the due process inquiry often looks to *substantive* state law to determine whether an entitlement has been created which constitutes a protected liberty or property interest. If the court finds such a *substantive* interest (either one created by state law or a natural liberty interest), then the second part of the due process inquiry looks to the Federal Constitution to determine what kinds of *procedural protections* are constitutionally required in that specific context. The level of constitutionally required procedures is determined independently of state law. Thus, just as the fact that a state has chosen to provide *less* procedural protection than the Constitution requires does not affect the constitutional inquiry (see *supra* pp. 40-43), the fact that a state has chosen to provide *more* procedural protection than the Constitution requires does not transform those additional devices into constitutionally compelled procedures.[25] In this case, of course, Kevin Taylor is not

[25] The six Court of Appeals decisions that the State cites (Petr's Br. 25-27) involve this principle – that state procedural rules are not automatically elevated to requirements of due process – and do not in any way establish that the applicability of the Due Process Clause to affirmative defenses was "susceptible to debate among reasonable minds." Petr's Br. 25 (quoting *Butler*, 494 U.S. at 415). These cases simply apply *Patterson* and *Engle* to hold that a defendant's due process rights are not violated by state violations of their own *procedures*. See *Smart* v. *Leeke*, 873 F.2d 1558, 1564-1565 (4th Cir.) (habeas corpus petitioner argued that state must bear burden of disproving self-defense beyond a reasonable doubt), cert. denied, 493 U.S. 867 (1989); *Allen* v. *Redman*, 858 F.2d 1194, 1200 (6th Cir. 1988) (habeas corpus petitioner sought to rely on state procedural rule to require state to negate affirmative defense); *Walker* v. *Endell*, 850 F.2d 470, 476 (9th Cir. 1987) (habeas corpus petitioner sought to rely on state procedural rule to require state to negate affirmative defense), cert. denied, 488 U.S. 926 (1988); *Willard* v. *California*, 812 F.2d 461, 463 (9th Cir. 1987) (habeas corpus petitioner sought to rely on state procedural requirement to support contention that he was entitled to have his jury charged with a more specific instruction than the one his jury received); *Knaubert* v. *Goldsmith*, 791 F.2d 722, 725-726 (9th Cir.) (habeas corpus petitioner sought to rely on state procedural rule regarding instructions designed to place the burden on the state to prove sanity beyond a reasonable doubt), cert. denied, 479 U.S. 867 (1986); *Wood* v. *Marshall*, 790 F.2d 548, 551-552 (6th Cir. 1986) (habeas corpus petitioner sought to rely on state procedural rule to require state to negate affirmative defense), cert. denied, 479 U.S. 1036 (1987).

relying on the presence of any state *procedural* protection as the predicate of his liberty interest. He is relying on the very *substantive* entitlement to a sudden and intense passion defense.

There is no support, then, either in this Court's decisions or in lower courts' decisions, for the proposition that proceedings relating to affirmative defenses are beyond due process review. Nor is such a position tenable. Under the State's theory, the Due Process Clause would have nothing to say about a state proceeding in which a defendant was barred from testifying about an affirmative defense, barred from presenting witnesses about an affirmative defense, barred from having the assistance of counsel with respect to an affirmative defense, barred from confronting witnesses who refute an affirmative defense, or otherwise deprived of recognized constitutional rights with regard to the adjudication of an

affirmative defense. For, after all, those rights are made applicable against the states only through the Due Process Clause of the Fourteenth Amendment. The State's position is utterly inconsistent with the central guarantee of the majestic Due Process Clause in this area: "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington* v. *Texas*, 388 U.S. at 19.

CONCLUSION

For the above stated reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

Lawrence C. Marshall
(Counsel of Record)
Roy T. Englert, Jr.
Carlos T. Angulo
Ragesh K. Tangri
Mayer, Brown & Platt
190 South LaSalle St.
Chicago, Illinois 60611
(312) 701-7355

Robert Agostinelli
Deputy Defender
Office of the State
Appellate Defender
Third Judicial District
1100 Columbus Street
Ottawa, Illinois 61350

Of Counsel:

Timothy P. O'Neill
Professor of Law
John Marshall Law School
315 S. Plymouth Court
Chicago, Illinois 60604

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois

TERENCE M. MADSEN
MARK E. WILSON
MARCIA L. FRIEDL
Assistant Attorneys General

STEVEN J. ZICK
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2139

Counsel for Petitioner

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No. 91-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

THE "RIGHT TO PRESENT A DEFENSE" IS TOO GENERAL A PROPOSITION TO DICTATE A RESULT UNDER *TEAGUE*.

Taylor asks this Court to extend the Due Process Clause to jury instructions on every affirmative defense defined by state law. Conspicuously absent from Taylor's brief is any citation to even a *single case* from this Court (or from virtually any other court) applying the Due Process Clause to an affirmative defense that does not implicate an element of the charged crime. It comes as no surprise, then, that Taylor chose to characterize the rule he invokes at such a high level of abstraction; without any specific case supporting his position, Taylor must rely on general principles extracted from earlier cases in an effort to extend precedent. As this Court has repeatedly held, however, courts may extend precedent on direct review but not on collateral review. " 'Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments. It is not designed as a substitute for direct review.' " *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion) (quoting *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part)).

Rather than extend precedent, courts must, on collateral review, apply rules compelled by precedent existing when the prisoner's conviction became final. *Graham v. Collins*, 61 U.S.L.W. 4127, 4129 (U.S. Jan. 26, 1993) (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)). Even if a habeas petitioner relies on an old rule, applying the rule "in a novel setting, thereby extending the precedent," violates *Teague*.

Stringer v. Black, 112 S. Ct. 1130, 1135 (1992). Accordingly, "[t]he crux of the analysis when *Teague* is invoked . . . is identification of the rule on which the claim for habeas relief depends." *Wright v. West*, 112 S. Ct. 2482, 2501 (1992) (Souter, J., concurring). Characterizing precedent by its underlying principles, as Taylor does, rather than by the holdings of the relevant cases, provides the mechanism for extending precedent rather than applying existing rules.[1] Taylor, however, does just what *Teague* prohibits: he insists that this conviction violated due process based on analogy from, rather than holdings of, earlier cases. Such arguments must fail under *Teague*.

This Court rejected an argument like Taylor's based on general principles in *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822 (1990). In *Sawyer*, the state prosecutor had allegedly violated Robert Sawyer's Eighth Amendment rights by emphasizing to the jury, during closing argument, that the jury's decision to impose the death penalty would be reviewed by the courts. 110 S. Ct. at 2825-26. *Caldwell v. Mississippi*, 472 U.S. 320 (1985), announced such an Eighth Amendment rule, but this Court decided *Caldwell* more than a year after Sawyer's conviction became final. 110 S. Ct. at 2826. Under *Teague*, therefore, the Court had to inquire first whether *Caldwell* announced a new rule because, if so, the Court could not apply *Caldwell* to Sawyer's case.

This Court held that *Caldwell* indeed announced a new rule because it was not dictated by existing precedent.

[1] "*Teague* and *Butler* [*v. McKellar*, 494 U.S. 407 (1990),] hold that federal courts may not consider a habeas petition if the petitioner relies on inferences based on the reasoning in the opinion rather than on holdings within the four corners of Supreme Court precedents." Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. Rev. 609, 641 (1991).

110 S. Ct. at 2827-31. Sawyer argued to the Court that *Caldwell* "was 'rooted' in the Eighth Amendment command of reliable sentencing" and that the application of this Court's precedent that recognized this Eighth Amendment interest to "misleading prosecutorial comment 'by analogy' would lead to the predictable *Caldwell* result." *Id.* at 2828. The Court quickly rejected this argument, however, because it found the Eighth Amendment command of reliable sentencing too general to dictate any specific result. *Id.* As the Court explained, the new-rule inquiry "would be meaningless if applied at this level of generality." *Id.*

The right to present a defense suffers from the same problem of generality. Sawyer's reliability-in-sentencing argument was *consistent* with the result he sought, but it was too general a principle to dictate any specific result because the Court had never held that all errors that might affect the reliability of a capital sentencing procedure violate the Eighth Amendment. Likewise, the right to present a defense is expansive enough to embrace virtually *any* argument presented by a criminal defendant; what state procedural error does not, in some way, affect a defendant's right to present a defense?

Taylor insists that the "right to present a defense" is not too general a characterization under *Teague*. Brief for Respondent, p. 34 n.17. He argues that this proposed rule is "necessarily a general one" and that specific applications of general rules cannot be "new rules" under *Teague*. *Id.* (citing *Wright v. West*, 112 S. Ct. at 2499 (Kennedy, J., concurring). This argument misapplies Justice Kennedy's point in *Wright*. Justice Kennedy explained that *Jackson v. Virginia*, 443 U.S. 307 (1979), exemplified a case whose rule requires a "case-by-case examination of the evidence" that would rarely trigger a new rule just because a habeas

court had not yet examined the specific evidence at issue in a given case. *Wright*, 112 S. Ct. at 2499 (Kennedy, J., concurring). *Jackson*, "[b]y its very terms[, . . .] provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all the evidence, so of course there will be variations from case to case." *Id.* Taylor, however, does not ask the Court to apply an accepted rule to a specific set of evidentiary *facts*; he asks the Court to expand upon and clarify the *law* in this murky area of due process.

The diverse precedent upon which Taylor relies certainly supports the uncontroversial proposition that the procedural component of the Due Process Clause preserves the right to defend oneself in a criminal trial in relation to the elements of the charged crime. Taylor cites *no case*, however, that describes, with any degree of specificity, why the general principles underlying this right to present a defense necessarily extend to affirmative defenses that a government might choose to permit a defendant to plead.

A. Cases Adjudicating Issues of Federal or State Law Cannot Dictate Results Under the Due Process Clause.

Many of the cases that Taylor cites do not even announce constitutional holdings; these courts merely address federal or state criminal procedure.[2] In *Strauss v.*

[2] *See Spurr v. United States*, 174 U.S. 728, 735 (1899); *United States v. Bailey*, 444 U.S. 394, 415-16 (1980); *Hickory v. United States*, 160 U.S. 408, 423 (1896); *Quercia v. United States*, 289 U.S. 466, 472 (1933); *Hopt v. Utah*, 110 U.S. 574, 583 (1884); *United States v. Middleton*, 690 F.2d 820, 826 (11th Cir. 1982), *cert. denied*,

(Footnote continued on following page)

United States, 376 F.2d 416 (5th Cir. 1967), for example, the Fifth Circuit overturned a conviction on procedural, not constitutional, grounds. *Id.* at 418-19. The court never suggested that the jury instruction error in that case "violated a defendant's right to due process of law." Brief for Respondent, p. 30. Whether federal criminal procedure would have required the federal government to retry Taylor is no more relevant to this habeas corpus proceeding than whether Illinois law would have required a retrial. *Sawyer*, 110 S. Ct. at 2830 (" 'the availability of a claim under state law [or, by implication, federal law] does not of itself establish that a claim was available under the United States Constitution' ") (quoting *Dugger v. Adams*, 489 U.S. 401, 409 (1989)). Taylor cannot rely on these criminal procedure cases to support his constitutional claim.

B. Cases Applying a Right to Present a Defense to the Elements of Crimes Never Even Address that Much More Difficult Question of Whether the Right Would Also Extend to Affirmative Defenses.

Other cases upon which Taylor relies address elements of crimes rather than affirmative defenses and exemplify cases of gross procedural unfairness that rise to the level of a due process violation. The instant case pales in comparison.

For example, *In re Oliver*, 333 U.S. 257 (1948), invalidated a summary criminal trial proceeding akin to the Court of Star Chamber in which a judge, also sitting as

[2] *continued*
460 U.S. 1051 (1983); *United States v. Blair*, 456 F.2d 514, 520 n.5 (3d Cir. 1972); *Allen v. State*, 97 Nev. 394, 397, 632 P.2d 1153, 1155 (1981).

a one-man grand jury, summarily charged, convicted and sentenced Oliver in a secret proceeding without giving notice, permitting him to obtain counsel or granting him the opportunity to cross-examine witnesses who testified against him. *Id.* at 258-60. Given these many, serious procedural irregularities, Oliver had no fair chance to defend himself in relation to the elements of the charged crime. The Court indeed stated that Oliver "had a right to his day in court" (*id.* at 273), but this general comment hardly constitutes the Court's holding and it surely could not dictate the result that Taylor seeks. *Oliver* merely holds that summary criminal convictions, without notice, hearing and counsel, violate due process. *Id.* at 275-76. Other than allowing Taylor to pluck some choice language out of context, *Oliver* is completely inapposite to this case.

Oliver, like many other cases that Taylor cites,[3] simply begs the question of whether the Due Process Clause ap-

[3] *See Washington v. Texas*, 388 U.S. 14, 17-23 (1967) (state law wrongly prevented defendant from calling witness to testify regarding the commission of the offense); *Chambers v. Mississippi*, 410 U.S. 284, 291 (1973) (same); *Rock v. Arkansas*, 483 U.S. 44, 57 (1987) (state procedural rule prevented the defendant "from describing any of the events that occurred on the day of the shooting"); *Crane v. Kentucky*, 476 U.S. 683, 687-92 (1986) (evidence relating to credibility of confession excluded); *Webb v. Texas*, 409 U.S. 95, 98 (1972) (per curiam) (trial judge interfered with defendant's witness who would testify about the commission of the crime); *Spurr*, 174 U.S. at 735 (elemental issues of intent and knowledge taken from the jury); *Quercia*, 289 U.S. at 472 (improper judicial comment on evidence relating to element of charged offense); *Hopt*, 110 U.S. at 583 (same); *Hickory*, 160 U.S. at 423 (instruction affected jury's deliberation on element of offense); *Cool v. United States*, 409 U.S. 100, 101-04 (1972) (per curiam) (same); *United States v. Escobar de Bright*, 742 F.2d 1196, 1201-02 (9th Cir. 1984) (same); *United States v. Hicks*, 748 F.2d 854, 857-58 (4th Cir. 1984) (failure to give alibi instruction violated due process); *Zemina v. Solem*, 438 F. Supp. 455, 469-70 (D. S.D. 1977) (instructions prevented a finding of in-

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plies to an affirmative defense created by state or federal criminal law. In fact, at least one of the cases he cites explicitly supports Gilmore's position. In *State v. Miller*, 186 Conn. 654, 660, 443 A.2d 906, 909 (1982), the Connecticut Supreme Court indeed stated that the defendant had a constitutional right to an instruction on self-defense, but only because the lack of self-defense constituted an element of the charged crime under Connecticut law. *See State v. Preyer*, 198 Conn. 190, 198-99, 502 A.2d 858, 862-63 (1985) (the "due process right to establish a defense" only extends to elements of crimes); *State v. Suggs*, 209 Conn. 733, 751, 553 A.2d 1110, 1121 (1989) (*Preyer* holds that due process only extends to elements and not affirmative defenses). The Connecticut Supreme Court unanimously agrees with Gilmore's position.

Unlike Mr. Oliver, Taylor essentially conceded that he committed the elements of the charged crime of murder. Taylor never contested that he killed Scott Siniscalchi and he never contested that he intended to do so. His jury heard the government's evidence on these points, found

[3] *continued*

tent), *aff'd*, 573 F.2d 1027 (8th Cir. 1978) (per curiam); *Naugher v. State*, 685 P.2d 37, 41 (Wyo. 1984) (same). The directed verdict cases (*e.g.*, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)) and presumption cases (*e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979)) similarly address elements rather than affirmative defenses.

Other cases that Taylor cites are distinguishable because they are capital cases. *See Green v. Georgia*, 442 U.S. 95 (1979) (per curiam) (testimony relevant to the acts causing the victim's death excluded as hearsay); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (invalidating instructions relevant to mitigation evidence). The Constitution requires proper jury instructions on all mitigating evidence in capital cases. *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990). Justice Scalia's comments in dissent must also be read in this light. *Id.* at 459-60 n.1 (Scalia, J., dissenting).

it persuasive beyond a reasonable doubt and convicted him of murder. Accordingly, Taylor unquestionably asks this Court to *extend* the holding of these elements cases to affirmative defense cases like this one. It is hardly "obvious," therefore (Brief for Respondent, p. 12), that Illinois violated his "right to present a defense" when this Court has never yet extended the Due Process Clause as Taylor wishes.[4] As the *Preyer* court held:

> Despite the defendant's contention to the contrary, *Washington v. Texas* does not establish an unqualified constitutional right to correct jury instructions on any defense the defendant may have. The only relevant issue therein decided was the applicability, in state court proceedings, of the sixth amendment right of a criminal defendant to have compulsory process for obtaining witnesses in his favor.

198 Conn. at 197 n.9, 502 A.2d at 862 n.9 (internal citation omitted). This statement reflects a patently reasonable restatement of *Washington*'s holding. This Court may *extend* this holding to include jury instructions on affirmative defenses at some time in the future. It cannot do so

[4] As late as 1976, Professor Clinton (whom Taylor cites in support of his theory) was constrained to report that, despite cases such as *Cool* and *Washington v. Texas*, this Court "has had occasion to review many cases which touch on this issue and yet has rarely suggested that the criminal defendant has a right to present his defense or explained the appropriate test to be applied to such a guarantee." Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 714 (1976) (footnotes omitted). *See also id.* at 795 ("While the Supreme Court's prior right to defend cases provide some suggestions regarding the source of this constitutional right, the cases almost totally fail to provide any rationale or consistent test to be applied in such cases"). The "lack of theoretical development" that Professor Clinton pointed to in this article (*id.* at 714) is even more telling in the context of affirmative defenses created solely by state law.

on collateral review, however, without ignoring *Teague*'s well-established rule of retroactivity.

C. The Only Cases That Taylor Cites Finding a Constitutional Right to Present a Defense in the Context of a Pure Affirmative Defense Are Distinguishable Because Taylor Never Offered a Correct Instruction and Because Only Minimal Evidence Supported Voluntary Manslaughter.

Taylor cites to only one appellate court in the country (other than the Seventh Circuit) that has found a right to present a defense in the context of an affirmative defense distinct from the elements of the charged crime. *See United States ex rel. Means v. Solem*, 646 F.2d 322 (8th Cir. 1980). Even in the Eighth Circuit, however, Taylor would not prevail on habeas corpus, because that court requires significant evidence supporting the affirmative defense and requires a contemporaneous request for a correct instruction. *See Frey v. Leapley*, 931 F.2d 1253, 1255 (8th Cir. 1991); *Woods v. Solem*, 891 F.2d 196, 198-99 (8th Cir. 1989), *cert. denied*, 495 U.S. 920 (1990).[5] Under these cases, Taylor's conviction would not violate due process because he never objected to the instruction and because his affirmative defense case was not even close.

[5] Indeed, the Seventh Circuit itself had previously required "unequivocally strong" evidence to support the requested instruction before it would find that a state court's refusal to give the instruction amounted to a fundamental miscarriage of justice. *United States ex rel. Peery v. Sielaff*, 615 F.2d 402, 404-07 (7th Cir. 1979) (per curiam), *cert. denied*, 446 U.S. 940 (1980). The court inexplicably retreated from this high threshold in the decision below and seized instead upon a dictum in *United States ex rel. Bacon v. DeRobertis*, 728 F.2d 874, 875 (7th Cir.) (per curiam), *cert. denied*, 469 U.S. 840 (1984), suggesting that the Due Process Clause requires an affirmative defense instruction whenever "credible" evidence supports it. Pet. App. 18. The decision below is apparently the first in the land to announce such a minimal standard for due process scrutiny.

Illinois law required the trial court to instruct Taylor's jury on voluntary manslaughter if only "very slight evidence" supported the charge (*People v. Williams*, 205 Ill. App. 3d 751, 765, 563 N.E.2d 762, 770 (1st Dist. 1989), *appeal denied*, 141 Ill. 2d 558, 580 N.E.2d 132 (1991); *People v. Arnold*, 139 Ill. App. 3d 429, 434, 487 N.E.2d 997, 1000 (1st Dist. 1985)), and that was the case here. As the Illinois Appellate Court held in Taylor's state appeals, Taylor had presented no evidence whatsoever that his passion was sudden and "the provocation was very questionable." Pet. App. 38, 42-43. The court explained that the record "clearly shows" that correct instructions "would have been *very unlikely* to have resulted in" a conviction of voluntary manslaughter rather than murder. *Id.* at 43 (emphasis added). Given this straightforward application of the Illinois law of voluntary manslaughter on two separate occasions by unanimous Illinois Appellate Court panels and given the Illinois Supreme Court's refusal to review both of these appellate decisions, this Court cannot declare that Taylor's conviction amounted to a "complete miscarriage of justice [or] an omission inconsistent with rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962).[6]

[6] Taylor himself never even questioned the murder instruction until he filed his brief on direct appeal. As this Court explained in *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977), since the defense never even questioned the challenged instruction until the appeal, "the probability that it substantially affected the jury deliberations seems remote." *Accord Estelle v. Williams*, 425 U.S. 501, 510-13 (1976) (waiver indicates that an alleged error did not violate due process); *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978) (Stevens, J., dissenting) (same); *Thwing v. South Dakota*, 470 F.2d 351, 353 (8th Cir. 1972) (per curiam) (failure to object to instructions on charged offense indicated no fundamental unfairness in habeas claim based on state court's failure to instruct on an affirmative defense and on lesser included offenses), *cert. denied*, 411 U.S. 937 (1973); *Higgins v. Wainwright*, 424 F.2d 177, 178 (5th Cir.) (per

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II.

PATTERSON COULD NOT HAVE ANNOUNCED A PURELY PROCEDURAL HOLDING WITHOUT RENDERING THE WHOLE *WINSHIP* LINE OF CASES ARBITRARY AND IRRECONCILABLE.

Taylor argues that *Patterson v. New York*, 432 U.S. 197 (1977), says nothing about substantive liberty interests. The Due Process Clause applies to affirmative defenses, he reasons, because *Patterson* and like cases address only the question of how much process is due rather than whether a liberty interest exists. Brief for Respondent, pp. 43-50. This argument necessarily renders *In re Winship*, 397 U.S. 358 (1970), and subsequent cases arbitrary and unprincipled. An argument that destroys the doctrinal stability of twenty-three years of precedent cannot be said to rest on settled principles of law or be dictated by existing precedent.

Patterson superficially reads like a case analyzing how much process was due. The Court held that the Due Process Clause permitted New York to require a criminal defendant to prove provocation by a preponderance of the evidence as an affirmative defense. 432 U.S. at 205-16. As the Court later made explicit, however, *Patterson*'s holding was premised on the "greater-includes-the-lesser" concept: the "greater" power to create the affirmative defense includes the "lesser" power of establishing any burden of proof the legislature might choose. *McKoy v. North Carolina*, 494 U.S. at 442; *id.* at 450 (Blackmun, J., concurring). Thus, the Court may have drawn sharp distinctions between substance and procedure in some areas (see *Cleveland Board of Education v. Loudermill*,

[6] *continued*
curiam) (failure to request a lesser included offense instruction prevented a finding that a state conviction violated due process for failure to instruct on the lesser included offense), *cert. denied*, 400 U.S. 905 (1970). *See also infra* § III, pp. 16-19.

470 U.S. 532, 541 (1985)), but it has never done so with regard to affirmative defenses in criminal cases. The amount of process due a criminal defendant, at least with regard to affirmative defenses, depends on the substantive state law.

Furthermore, labeling *Patterson* as a strictly procedural decision would make it functionally irreconcilable with *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and would render the element-non-element distinction completely arbitrary. *See* Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 Mich. L. Rev. 30, 48-50 (1977) (procedural view of *Winship* means the amount of process due in any given case depends on the purely arbitrary question of whether a legislature includes a factor relating to culpability in the statutory definition of a crime); John C. Jeffries, Jr., & Paul B. Stephan III, *Defenses, Presumptions, and Burdens of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1344-56 (1979) (same). Comparing *Mullaney* with *Patterson* illustrates the problem. In *Mullaney*, the Court held that Maine could not require a defendant to prove provocation by a preponderance of the evidence as a mitigating factor of murder; rather, the Court held that the Due Process Clause required the state to disprove provocation beyond a reasonable doubt. 421 U.S. at 695-704. In *Patterson*, by contrast, the Court found no constitutional infirmity in New York's statutory scheme that required a defendant to prove provocation by a preponderance of the evidence just like Maine's did. 432 U.S. at 205-16. The two statutes only differed in that Maine included the *absence* of provocation as an element of murder while New York considered the *existence* of provocation as a distinct, non-elemental, affirmative defense. *Id.* at 212-16. The Court has adhered to *Patterson*'s element-non-element distinction in many subsequent cases and in a variety of contents. *See, e.g.*,

Martin v. Ohio, 480 U.S. 228 (1987); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Francis v. Franklin*, 471 U.S. 1301 (1985); *Engle v. Isaac*, 456 U.S. 107 (1982); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Jackson v. Virginia*, 443 U.S. 307 (1979).

If considered as purely procedural decisions, *Mullaney* and *Patterson* irreconcilably conflict. Both Gordon Patterson and Stillman Wilbur claimed that they deserved much lower sentences; accordingly, they had equivalent claims to natural liberty. Nonetheless, the Court found Patterson deserving of much less process than Wilbur. The different results in the two cases necessarily mean that calling a factor, like provocation, an affirmative defense rather than calling the absence of the factor an element of the crime has substantive significance.

Limiting the Due Process Clause to elements of crimes resolves the otherwise arbitrary distinction between elements and non-elements. Elements trigger due process scrutiny because our society wishes to minimize the risk of convicting innocent people of crimes. *Winship*, 397 U.S. at 372 (Harlan, J., concurring). Non-elements (like provocation in Illinois) do not trigger due process scrutiny because a state's greater power to enact an affirmative defense statute if it so chooses includes the lesser power to adjudicate those defenses by its own state procedures. "[I]f a state could choose to do something—choose, for example, to make self-defense an affirmative defense to murder—then the federal inquiry is over; whether the state has indeed so chosen is a question of its domestic law." *Flowers v. Illinois Dep't of Corrections*, 962 F.2d 703, 711 (7th Cir.) (Easterbrook, J., concurring), *petition for cert. filed*, 61 U.S.L.W. 3150 (U.S. Aug. 5, 1992) (No. 92-253) (citations omitted).

This approach also serves the laudable goal of not turning virtually every violation of state law into a federal constitutional violation:

The Constitution requires the prosecution to prove its case beyond a reasonable doubt. If the state court does not frame the instructions accurately under state law, how can the jury have found every element beyond a reasonable doubt? *Winship* implies that the state must bring forth evidence from which a sane fact finder could conclude, beyond a reasonable doubt, that the accused committed the offense. *Jackson v. Virginia*, 443 U.S. 307 (1979). Does it not then follow that any important error violates the Constitution? If the trial judge misunderstands state law, how can the jury have made the necessary findings? All of these methods [of turning state-law violations into federal constitutional violations] come to the same thing: disparity between the "real" state law and the rules applied in a particular case violates the Constitution. Yet if these and cognate methods are indeed appropriate, then the many cases telling federal courts to distinguish between violations of state and federal law are nothing but hot air. The distinction is vital but trivial, governing only when, as in *Estelle v. McGuire*, the judge is so careless as to say that the writ must issue to redress an error of state law.

Id. at 710-11 (some citations omitted).

It simply cannot be, as Taylor essentially argues, that every criminal statute written by every government creates a protectible liberty interest under the Due Process Clause. This Court has distinguished time and again between errors of state law and violations of the Constitution. *See, e.g., Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 3102 (1990); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Isaac*, 456 U.S. at 121 n.21; *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (per curiam); *Beck v. Washington*, 369 U.S. 541, 554-55 (1962); *Gryger v. Burke*, 334 U.S. 728, 731 (1948). Clearly, then, not *all* statutes create a "substantial and legitimate expectation" of a statutory right. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). "If the contrary were

true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.' " *Isaac*, 156 U.S. at 121 n.21 (quoting *Gryger*, 334 U.S. at 731)).[7]

Taylor argues that he had an entitlement to his voluntary manslaughter defense and an entitlement to natural liberty, so the state-law jury instruction error arbitrarily denied him due process. *Engle v. Isaac* and numerous circuit court cases are different from this case, he suggests, because the state statutes that were violated in those cases created no entitlements and did not affect the habeas petitioners' liberty. Brief for Respondent, pp. 48-49 & n.25. The facts of those cases, however, do not permit such a facile distinction.

In *Isaac*, for example, the jury instructions wrongly required the habeas petitioners to prove self-defense. If Taylor had a substantial and legitimate expectation that he would be sentenced to a maximum of fifteen years if the jury believed his *partial* affirmative defense, then Isaac, Hughes and Bell certainly had substantial and legitimate expectations that they would be acquitted if Ohio failed to disprove, beyond a reasonable doubt, their *complete* defenses. Although the *Isaac* jury instruction error related to the burden of proof, the application of that drastically wrong burden of proof may well have deprived the defendants of their defenses. It defies reason to suggest that,

[7] These concerns, at least initially, did not trouble the Seventh Circuit. In *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), which first found the pattern instructions unconstitutional, the court intended to "effectuat[e] the holding of *Reddick* through the vehicle of the Due Process Clause." *Id.* at 1136. That rationale "produced something of an embarrassment, for characterizing the rule as 'effectuat[ing] the holding of *Reddick*,' " a decision on state law, " 'through the vehicle of the Due Process Clause' shows that we do not have a constitutional rule at all." *Flowers*, 962 F.2d at 709 (Easterbrook, J., concurring).

in a criminal case, radically shifting the burden of proof can have no effect on the defendant's expectation of natural liberty.

In sum, the constitutionality of Taylor's jury instructions depends on how much deference the due process clause affords to state courts to adjudicate their own procedural errors. The Illinois Supreme Court has held that these pattern instructions seriously misstated Illinois law, but not seriously enough to invalidate final convictions. *See generally People v. Flowers*, 138 Ill. 2d 218, 561 N.E.2d 674 (1990). The Seventh Circuit should not have intruded into that application of Illinois law. *See Flowers*, 962 F.2d at 711 (Easterbrook, J., concurring) ("Judges of a state's highest court must now think thrice before they find a flaw in a pattern jury instruction! From now on, prudence lies in perpetuating dubious instructions rather than improving them"). Until this Court articulates a definitive standard for distinguishing state-law errors from due process violations, jury instruction errors like Taylor's cannot violate due process other than by virtue of new rules under *Teague*.

III.

IF TAYLOR HAD A STATUTORY ENTITLEMENT TO PRESENT A DEFENSE, HE WAIVED THAT RIGHT BY NOT OBJECTING AT TRIAL TO THE INSTRUCTIONS.

For the first time since his murder conviction in 1986, Taylor argues that he had a statutory entitlement to jury consideration of voluntary manslaughter and, because the instructions might have permitted the jury to convict him without considering his affirmative defense, the conviction violated due process under *Hicks v. Oklahoma*.[8] If the

[8] On direct appeal, Taylor apparently only argued that his instructions violated Illinois law. The Illinois Appellate Court found that

(Footnote continued on following page)

Court finds an entitlement despite *Patterson*, Taylor's argument still fails because Illinois criminal procedure afforded him more than adequate process.[9]

Section 115-4(a) of the Code of Criminal Procedure of 1963 states that questions of fact shall be decided by the jury. Ill. Rev. Stat. ch. 38, ¶ 115-4(a) (1985). To the extent that the jury charge permitted the jury to find Taylor guilty of murder without resolving the factual issue of provocation, the state trial court violated section 115-4(a). Taylor would presumably claim that every violation of section 115-4(a) violates the Due Process Clause, but such a claim would ignore the other statutory procedures designed specifically to remedy procedural errors like the one in this case. The Illinois Supreme Court's rules governing criminal trial procedure require counsel to object at the jury instruction conference to contest a jury instruction. Ill. Sup. Ct. R. 451(b), Ill. Rev. Stat. ch. 110A,

[8] *continued*
he had waived any error by not tendering a proper instruction and that, because his voluntary manslaughter evidence was not strong, he could not establish plain error. Pet. App. 38. On state collateral review, Taylor argued that the recently-decided case of *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), held that use of the pattern instructions constituted plain error and established that his conviction violated due process under *In re Winship*. The Illinois Appellate Court rejected this argument because, under *Patterson v. New York*, *Winship* does not extend to affirmative defenses. Pet. App. 41-42. In the lower federal courts, Taylor argued that the absence of provocation constituted an element of murder in Illinois. Brief for Appellant at 13-18, *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992). He also superficially argued that the instructions were fundamentally unfair but without any succinct analysis. *Id.* at 22-24.

[9] The Seventh Circuit found that Illinois had waived a procedural default argument premised on *Wainwright v. Sykes*, 433 U.S. 72 (1977). Pet. App. 17 n.5. Gilmore does not press that argument in this Court, either. Rather, as explained in the text, procedural default also materially affects the merits of Taylor's due process claim under *Hicks v. Oklahoma*.

¶ 451(b) (1985). Taylor indisputably failed to preserve his objection under Rule 451(b). (J.A. 51 & 101).

The procedural protections afforded Taylor did not end at the trial, however. First, Taylor could have moved for a new trial based on the incorrect instruction, but he did not. Ill. Rev. Stat. ch. 38, ¶ 116-1 (1985). Second, he still had every right to raise the issue on appeal and, under Illinois' plain-error rule, "substantial defects [in jury instructions] are not waived by failure to make timely objections thereto if the interests of justice require." Ill. Sup. Ct. R. 451(c), Ill. Rev. Stat. ch. 110A, ¶ 451(c) (1985). Taylor indeed challenged the instructions on direct appeal, but the court found the plain-error rule inapplicable—principally because the court found Taylor's voluntary manslaughter case was not strong. Pet. App. 38. The Illinois Supreme Court denied Taylor's petition for further review, and this Court has no reason to question the Illinois Appellate Court's assessment of Taylor's case or application of Illinois' plain-error rule.[10]

This Court has found state criminal procedure adequate to protect a statutory entitlement in *Ross v. Oklahoma*, 487 U.S. 81 (1988). In that capital case, the trial court wrongly deprived the defendant of his statutory entitlement to exercise a limited number of peremptory challenges. This Court affirmed after scrutinizing other aspects of Oklahoma criminal procedure to determine whether that process sufficed, under the Due Process Clause, to protect the defendant's entitlement to his peremptory challenges. Oklahoma law *required* defendants to exercise peremptory challenges to preserve a claim of error re-

[10] *Reddick* requires no different conclusion. Although that case indeed held that use of the pattern murder instructions constituted plain error, the Illinois Supreme Court has held that "*Reddick* should not be applied retroactively" to invalidate final convictions. *People v. Flowers*, 138 Ill. 2d at 239-42, 561 N.E.2d at 682-84.

lating to a wrongful denial of a challenge for cause, and the Court found "nothing arbitrary or irrational about such a requirement, which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury." *Id.* at 90.

Ross parallels this case. As Taylor concedes, Illinois had no more a constitutional obligation to permit a jury to consider voluntary manslaughter than Oklahoma had to create peremptory challenges. Brief for Respondent, p. 41.[11] And just as it was "a long settled principle of Oklahoma law" that a defendant who wanted to preserve a claim of error based on a wrongful denial of a for-cause challenge had to exercise a peremptory challenge, settled Illinois law required defendants to object at trial or meet the plain-error standard to preserve a challenge to an instruction. This rule preserves orderly trial procedure while still permitting reconsideration of the error "if the interests of justice require." Ill. Sup. Ct. R. 451(c), Ill. Rev. Stat. ch. 110A, ¶ 451(c) (1985). *See also Clemons*, 497 U.S. at 746-47 (other state procedures indicated that defendant had no unqualified entitlement to jury sentencing). Illinois criminal procedure amply protected any entitlement Taylor had to jury consideration of his defense.

[11] Indeed, voluntary manslaughter in Illinois is directly analogous to sentencing factors considered by juries in capital cases. After the State presents its murder case, the defendant has the option of bringing forth evidence that will mitigate the sentence down from a maximum of 40 years to a maximum of 15. As the Court reaffirmed in *Cabana v. Bullock*, 474 U.S. 376 (1986), a defendant charged with a serious crime has a constitutional right to have a jury determine his guilt or innocence (by which it meant having the jury consider the elements of the charged crime), but "[t]he decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury." *Id.* at 384-85. *See also Clemons v. Mississippi*, 494 U.S. 738, 745-46 (1990); *McMillan v. Pennsylvania*, 477 U.S. at 93; *Spaziano v. Florida*, 468 U.S. 447, 462-65 (1984).

IV.

THE RULE ANNOUNCED IN THE CASE BELOW DOES NOT QUALIFY FOR RETROACTIVE APPLICATION UNDER THE SECOND *TEAGUE* EXCEPTION.

Teague makes clear that its second exception is reserved for watershed rules of criminal procedure. 489 U.S. at 311. Taylor repeatedly cites to *Washington v. Texas* and *Chambers v. Mississippi* to support his argument that Illinois violated his right to present a defense. Brief for Respondent, pp. 23-25, 31 & 50. Unlike *Gideon v. Wainwright*, 372 U.S. 335 (1963), which indeed announced a "bedrock procedural" rule that defendants have a right to counsel (*Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring in part and dissenting in part)), the new rule upon which Taylor relies would not itself establish any bedrock principle. That honor, as Taylor himself emphasizes, would go to *Washington v. Texas* and *Chambers v. Mississippi*. Accordingly, *Teague*'s second exception does not apply to this case.

CONCLUSION

For these reasons, this Court should reverse.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General of Illinois

TERENCE M. MADSEN
MARK E. WILSON
MARCIA L. FRIEDL
Assistant Attorneys General

STEVEN J. ZICK*
Assistant Attorney General

*Counsel of Record

Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

vs.

KEVIN TAYLOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

* Attorney of Record

QUESTION PRESENTED

Is a rule that overturns an established state practice "new" under *Teague* v. *Lane*, 489 U. S. 288 (1989)?

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IN THE

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OCTOBER TERM, 1992

JERRY D. GILMORE,

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Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the use of federal habeas corpus to retroactively apply a rule invalidating an established state practice. This use of retroactivity is enormously disruptive to state judicial systems and seriously undermines the finality of state convictions. This is contrary to the rights of victims and society which CJLF was formed to advance.

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1. CJLF has received written consent from both parties to file this brief.

SUMMARY OF FACTS AND CASE

On September 14. 1985, Kevin Taylor stabbed to death his ex-wife's boyfriend, Scott Sinscalachi. On the day of the killing, Taylor had called his ex-wife Joyce to arrange plans for him to visit with their daughter Katie. Taylor made a subsequent call to change the plans, but Sinscalachi answered this time and refused to let Taylor talk to Joyce or visit Katie. Pet. App. 2-3.

After this, Taylor drove to Joyce's apartment, where he found Katie sitting on the floor while Joyce and Scott were sitting up in bed. A fight ensued and Taylor stabbed Scott, killing him. *Id*., at 3.

At trial, the jury was given Illinois' pattern instructions on murder and voluntary manslaughter. Illinois' pattern instructions were prepared by a committee of judges, professors, and attorneys appointed by the Illinois Supreme Court. See Illinois Pattern Jury Instructions, Criminal vii-ix (2d ed. 1981). It was "the long-standing practice" in Illinois murder cases to give the jury the pattern instructions on murder and voluntary manslaughter. See *People* v. *Flowers*, 561 N. E. 2d 674, 683 (Ill. 1990). They did not expressly tell the jury that it had to consider defendant's manslaughter evidence even if it found both elements of murder. Taylor was convicted of murder and received a 35-year sentence. Pet. App. at 4.

Taylor's direct appeal and state postconviction efforts were unsuccessful. See *id*., at 4-5. After his conviction became final, the Illinois Supreme Court found that the same pattern instructions that had been given in Taylor's case were erroneous. See *People* v. *Reddick*, 526 N. E. 2d 141 (Ill. 1988). In *Falconer* v. *Lane*, 905 F. 2d 1129, 1136 (CA7 1990), the Seventh Circuit held that *Reddick* had a constitutional dimension, and used this to overturn an Illinois murder conviction on federal habeas corpus. In the present case, the district court refused to apply *Falconer* to Taylor's conviction, finding that it was a new rule under *Teague* v. *Lane*, 489 U. S. 288 (1989). Pet.

App. 32. The Seventh Circuit reversed, finding *Falconer* was dictated by *Boyde* v. *California*, 494 U. S. 370 (1990) and *Connecticut* v. *Johnson*, 460 U. S. 73 (1983). Pet. App. 21-22.

SUMMARY OF ARGUMENT

The Seventh Circuit improperly analyzed the newness question under *Teague*. The two authorities it cites to support its finding that the *Falconer* rule was not new are incapable of supporting this proposition. One authority is too late and both are too general to support the Seventh Circuit's *Teague* analysis.

The finality interests underlying *Teague* would best be served by a rule that any decision overturning an established state practice is *per se* "new" under *Teague*. This would serve the important interests of minimizing the disruptiveness of federal habeas corpus on state criminal justice systems. It would also provide a useful bright line that would make *Teague* more straightforward to apply, thus reducing the risk of erroneous applications of *Teague* like the one in the present case.

The established practice rule is consistent with *Teague*. A court presented with a challenge to an established statewide practice will at most be presented with a disagreement on the constitutionality of the practice. In this situation, upholding the practice constitutes a good faith interpretation of the Constitution. As the deterrent purpose of habeas corpus is thus unaffected by the established practice rule, the rule comports with *Teague*.

The present case demonstrates the need for this rule. The Illinois Supreme Court decided on its own to make the instructions more favorable for defendants. But it limited the impact of this decision by not allowing it to be applied retroactively on collateral attack. The decision of the Seventh Circuit to retroactively apply a rule derived

from the Illinois Supreme Court's decision thus punishes Illinois for its own good deed.

The decision in *Penry* v. *Lynaugh*, that a rule overturning the established practice of the Texas courts was not new, should not prevent adoption of the established practice rule. Much of *Penry* has been eroded by this Court's subsequent interpretations of *Teague*; what remains of *Penry* should be confined to the retroactivity of the rule in *Penry*.

ARGUMENT

I. The Seventh Circuit's *Teague* analysis is incorrect.

The present case demonstrates that the road to bad decisions can be paved with the best intentions. The court below attempted a cogent and reasoned application of *Teague* v. *Lane*, 489 U. S. 288 (1989). It gave a detailed, clear analysis of what should be taken into account when deciding whether a rule should be new under *Teague*. See Pet. App. 7-12.

Unfortunately, the Seventh Circuit did not follow its own advice. It held that the unconstitutionality of the Illinois murder and voluntary manslaughter instructions was not a new rule as it was dictated by *Boyde* v. *California*, 494 U. S. 370 (1990) and *Connecticut* v. *Johnson*, 460 U. S. 73 (1983). Pet. App. 21-23. Neither of these cases can negate a finding of newness under *Teague*. The inability of the court below to properly apply *Teague* demonstrates that this Court needs to clarify when a rule is new.

A. Boyde v. California.

1. Too new.

The rule the Seventh Circuit analyzed for newness was established in *Falconer* v. *Lane*, 905 F. 2d 1129 (CA7 1990). *Falconer* held that Illinois' pattern instructions on

murder and voluntary manslaughter, see Illinois Pattern Jury Instructions, Criminal 7.02, 7.04, 7.06 (2d ed. 1981), when read together, did not tell the jury that if it found the mitigating circumstances necessary for voluntary manslaughter it could not convict defendant of murder. *Falconer*, *supra*, 905 F. 2d, at 1136. According to the *Falconer* Court, this limit on defendant's manslaughter defense[2] violated the Due Process Clause.[3] *Ibid*.

In the present case, the Seventh Circuit found that *Falconer*'s holding that the jury misapplied the instructions was dictated by *Boyde* v. *California*, 494 U. S. 370 (1990). Pet. App. 21. This betrays a fundamental misunderstanding of *Teague* v. *Lane*, 489 U. S. 288 (1989). *Teague* recognized that the main purpose of the habeas writ is "ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted *at the time of the proceedings*." *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990) (emphasis added). Thus, *Teague* looks to whether "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, *supra*, 489 U. S., at 301 (emphasis in original). Therefore, a decision rendered after the conviction was final cannot support a finding that the rule is not new. See *Saffle*, *supra*, 494 U. S., at 494.

Taylor's conviction was final on June 4, 1987, when the Illinois Supreme Court denied his petition for appeal.[4]

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2. Under Illinois law at the time, the mental element that mitigates murder to voluntary manslaughter acted as an affirmative defense. See *People* v. *Reddick*, 526 N. E. 2d 141, 145-146 (Ill. 1988). Manslaughter has since been abolished. *Ibid*.

3. *Amicus* also recognizes the weakness of the *Falconer* holding. *Falconer* found unconstitutional what is no more than an error of state law. See *Flowers* v. *Illinois Dept. of Corrections*, 962 F. 2d 703, 708-709 (CA7 1992) (Easterbrook, J., concurring), cert. pending, No. 92-253.

4. Arguably, the date of finality was September 2, 1987, when the time to file a certiorari petition expired. It makes no difference in this case.

Pet. App. 5. *Boyde* was decided in 1990. Therefore, *Boyde* was not the law at the time Taylor's conviction was final, and thus cannot support the Seventh Circuit's holding.

2. Too general.

Even if the Seventh Circuit could use *Boyde* to protect its rule from *Teague* attack, *Boyde* would not prevent a newness finding. The court below understood that mere similarity between the rule in question and a Supreme Court precedent was not enough to allow retroactivity. Relatively general precedents leave greater room for ambiguous interpretation and thus are less likely to dictate a rule. Pet. App. 9. This is the correct way to analyze precedent under *Teague*. If the allowed generality is too high then a rule can always be "dictated" by some precedent, turning *Teague* into a useless formality. See *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 207, 110 S. Ct. 2822, 2828 (1990).

The Seventh Circuit did not apply this principle. It found that the statements in *Cupp* v. *Naughten*, 414 U. S. 141, 146-147 (1973) that jury instructions must be viewed "as a whole" and in *Boyde* v. *California*, 494 U. S. 370, 380 (1990) that a reviewing court must ask "whether there is a reasonable likelihood that the jury has applied the challenged instruction" incorrectly were sufficiently specific to justify finding that *Falconer* was not a new rule. Pet. App. 21.

Allowing this level of generality would render *Teague* meaningless. The court below recognized that *Cupp* is too general to dictate *Falconer* within the meaning of *Teague*. Pet. App. 20. *Cupp*'s command to look at the entire instruction is relevant to a great many constitutional issues involving jury instructions. Therefore it is inapplicable to *Teague* analysis.

Boyde is no less general. The relevant part of *Boyde* dealt with whether California's death penalty instructions,

which listed eleven specific mitigating factors and a twelfth "catch-all" factor, satisfied defendant's Eighth Amendment right to have the jury "consider and give effect to all relevant mitigating evidence." 494 U. S., at 377. The *Boyde* Court noted that the standard for reviewing whether instructions unconstitutionally restricted the jury's consideration of evidence was unclear. *Id.*, at 378. In order to end the confusion, it developed the standard quoted by the Seventh Circuit. "We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.*, at 380.

The Seventh Circuit held that this dictated *Falconer*'s finding that the instructions were ambiguous and thus erroneously applied to preclude a voluntary manslaughter verdict. Pet. App. 21. The standard announced in *Boyde* does not dictate *Falconer*'s finding that the Illinois instructions were ambiguous. *Boyde* does supply a test for examining jury instructions, but this test does not dictate any particular result.

To say that the formulation of a test dictates a finding under that test is an invitation to abrogate *Teague*. This was recognized in *Sawyer* v. *Smith*, *supra*, where this Court rejected a contention similar to the one accepted by the Seventh Circuit. The *Sawyer* Court rejected petitioner's view that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) was "dictated by the principle of reliability in capital sentencing." 111 L. Ed. 2d, at 207, 110 S. Ct., at 2828. *Caldwell* held that a death sentence is unconstitutional when the sentencer has been led to believe that others will be responsible for determining the appropriateness of the death sentence. 472 U. S., at 328-329. While the well-established principle that the capital sentencing process must be reliable was an important reason behind the *Caldwell* holding, see *id.*, at 329, it did not compel the result.

The *Sawyer* Court understood that while reliability was an important part of *Caldwell*, the previous cases dealing with reliability did not address the issue decided in *Caldwell*. *Sawyer, supra*, 111 L. Ed. 2d, at 207, 110 S. Ct., at 2828. The prior cases advancing the interest in reliability involved statutory schemes prohibiting the consideration of certain relevant mitigating evidence, *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); mandatory capital sentencing, *Woodson* v. *North Carolina*, 428 U S. 280 (1976); and a capital sentence based upon information defendant did not have notice of and could not respond to, *Gardner* v. *Florida*, 430 U. S. 349 (1977) (plurality). See *Sawyer, supra*, 111 L. Ed. 2d, at 207, 110 S. Ct., at 2828. Although these cases were strong influences on *Caldwell*, they did not dictate it because they dealt with different situations. " 'Even were we to agree with [petitioner's] assertion that our decisions in *Lockett* or *Eddings* inform, or even control or govern, the analysis of his claim, it does not follow that they compel the rule that [petitioner] seeks.' " *Ibid.* (quoting *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990)).

The Seventh Circuit's application of *Boyde* is precisely what this Court sought to prevent in *Sawyer*. Application of the standard in *Boyde may* justify a finding that the jury instructions are ambiguous. But *Boyde* itself did not deal with the type of instruction given in the present case. Thus, like the precedent analyzed in *Sawyer*, even if *Boyde* might support the finding in *Falconer*, it did not dictate it.

B. Connecticut v. Johnson.

The Seventh Circuit's holding that *Connecticut* v. *Johnson*, 460 U. S. 73 (1983) dictates the result in *Falconer* is also insupportable. While its use of *Johnson* does not contain the obvious chronological error of its *Boyde* analysis, the Seventh Circuit's holding is nonetheless incorrect. It misinterprets *Johnson* to create an appearance of unanimity where none existed, in support of an argument that the *Johnson* decision never addressed.

The primary issue in the present case was whether *Falconer*'s holding, that the instructions deprived defendant of due process by preventing the jury from considering defendant's voluntary manslaughter evidence, was a new rule. The court below found that this holding was compelled by *Johnson*. It asserted that *Johnson* "considered jury instructions that created an erroneous presumption on the element of intent." Pet. App. 22. The Seventh Circuit found that the instruction in *Johnson*, like the one in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), had been found unacceptable because it "led the jury to ignore exculpatory evidence in finding defendant guilty of murder beyond a reasonable doubt." Pet. App. 22. Even though *Johnson* dealt with a presumption of intent and the present case involved an affirmative defense, the Seventh Circuit found *Johnson* close enough to compel *Falconer*'s holding. *Id.*, at 22-23. This holding is incorrect. *Johnson* dealt with a different, though related problem.

The first problem with *Johnson* is that it did not address the constitutionality of jury instructions. This Court granted certiorari in *Johnson* to determine whether a violation of *Sandstrom* can be harmless error. 460 U. S., at 75 (plurality). The constitutionality of the instructions was not in question. The *Johnson* plurality did note that conclusive presumptions on the issue of intent could lead juries to ignore evidence rebutting intent. See *id.*, at 85. The purpose behind this, however, was to support the plurality's conclusion that *Sandstrom* error was almost never harmless. The *Johnson* Court had to decide whether the prosecution could " 'prove[ ] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.*, at 82 (quoting *Chapman* v. *California*, 386 U. S. 18, 24 (1967)). Applying the *Chapman* standard the plurality concluded:

> "An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict." 460 U. S., at 85-86 (plurality) (footnote omitted).

While *Sandstrom* error may preclude a jury from hearing defendant's evidence on intent, that is not the reason the error is unconstitutional. *Sandstrom* was meant to be an extension of the holding in *In re Winship*, 397 U. S. 358, 364 (1970) that the prosecution must prove every element of the charged crime beyond a reasonable doubt. See *Sandstrom*, *supra*, 442 U. S., at 521; *Francis* v. *Franklin*, 471 U. S. 307, 313 (1985); *Rose* v. *Clark*, 478 U. S. 570, 580 (1986). This cannot be reconciled with the Seventh Circuit's holding that the basis of *Sandstrom* and *Johnson* was the failure of the jury to consider exculpatory evidence. Pet. App. 22. By the Seventh Circuit's reasoning, if defendant presented no exculpatory evidence on intent, then the instruction in *Sandstrom* would not be erroneous because defendant was not deprived of any mitigating evidence. Yet a defendant who does not submit exculpatory evidence may still prevail if the prosecution does not satisfy the burden of proof. Thus *Sandstrom* error can exist even when defendant submits no evidence.[5]

Johnson is a plurality opinion. Recognizing this, the Seventh Circuit tried to paint a picture of unity. It asserted that the *Johnson* dissent did not contest the

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5. A lack of mitigating evidence would make it more likely that any *Sandstrom* error was harmless. See *Rose*, *supra*, 478 U. S., at 583. But *Sandstrom* error is not harmless *per se* when defendant submits no evidence. If the prosecution's case is weak on intent, then *Sandstrom* error would still require reversal even if no exculpatory evidence was admitted. See *id.*, at 583-584.

purported holding of the plurality that the basis of *Sandstrom* was the exclusion of exculpatory evidence from the jury's consideration. Pet. App. 22, n. 7.

While the *Johnson* dissent did not directly attack the passage in *Johnson* that the Seventh Circuit relied upon, the evidentiary effect of *Sandstrom* error was hotly disputed.

> "Contrary to the plurality's assumption, a *Sandstrom*-type presumption does not operate independently of the evidence. The jury must look to the evidence initially to see if the basic facts have been proved before it can consider whether it is appropriate to apply the presumption." 460 U. S., at 96 (Powell, J., dissenting).

Justice Powell's dissent became the basis of the majority opinion in *Rose* v. *Clark* that effectively overruled the *Johnson* plurality. See *Rose*, *supra*, 478 U. S., at 580-581.

The Seventh Circuit attempts to use the passage from the *Johnson* plurality to compel a rule of law not before the *Johnson* Court. Its construction of the plurality opinion is directly contrary to this Court's decisions in the *Sandstrom* line of cases. The passage the Seventh Circuit used was contested by the dissenters, whose views ultimately prevailed on the main issue in *Johnson*.

If such weak authority can compel a decision for the purpose of *Teague*, then few rules can ever be new. While the *Johnson* plurality and *Falconer* both mentioned that jury instructions can prevent the jury from considering evidence, this does not mean that *Johnson* compelled *Falconer*. The precedential value of the passage relied on by the Seventh Circuit is so low that it is difficult to see it dictate anything, let alone *Falconer*. See *Teague*, *supra*, 489 U. S., at 301.

The inability of the panel below to apply *Teague* properly demonstrates a need to further clarify when a rule is new. While it may be "admittedly difficult to

determine when a case announces a new rule," *ibid.*, this difficulty should not prevent this Court from making *Teague* as clear to the federal courts as possible. In the next section, *amicus* will submit a bright line test for determining newness that advances the interests in habeas corpus and finality protected by *Teague* while lessening the risk of erroneous application by the federal courts. Hopefully, adoption of this standard will prevent future mishaps like the one in the present case.

II. A rule overturning an established state practice is *per se* new under *Teague*.

Teague v. *Lane*, 489 U. S. 288 (1989) is based upon the principle that the extraordinarily disruptive remedy of collateral attack on a final judgment should be strictly limited to those cases where its purpose is served. The purpose of habeas corpus is not served when the state courts have made a reasonable, good-faith interpretation under then-existing rules and when the judgment itself is not a fundamental miscarriage of justice.[6] See *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990).

When a state trial court is confronted with an established state practice that has not been voided by this Court or by the state appellate courts, the natural, good-faith thing to do is to continue the practice and uphold the conviction. Collateral attack on final convictions obtained under such practices invokes the interests of finality and comity which *Teague* protects.

The present case demonstrates that the federal habeas courts are willing to interfere with established state practices in spite of *Teague*. The one way to assure that finality interests are protected is to draw a bright line that decisions striking down established state practices are *per*

6. The latter point is addressed in more depth in our *amicus* brief in *Dixon* v. *Williams*, No. 92-111.

se new under *Teague*. Unless a practice has continued in defiance of this Court's precedents, it may only be overruled by a new rule.

A. Practical Benefits.

Protecting established state practices under *Teague* has two distinct advantages. First, it will help reduce the risk of federal courts disruptively overturning many final state convictions that relied upon an established practice. Second, it will provide a useful bright line for federal courts to follow, thus reducing the risk of erroneous applications of *Teague*, such as the one in the present case.

1. Preserving convictions.

A court's decisions do not exist in a vacuum. The law has a substantial impact on our affairs. Changes in the law can disrupt many lives. Therefore, this Court has consistently demonstrated a willingness to minimize the disruptiveness of its decisions. This is seen in the Court's *stare decisis* decisions. When people arrange their affairs in accordance with this Court's decisions, *stare decisis* may dictate preserving a decision to avoid disruption. See *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472, 486-487 (1924).

While *stare decisis* typically protects the reliance interests in property and contract cases, see *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991), the criminal justice system develops its own reliance interests. An established practice in criminal law or procedure is likely to have influenced many convictions, as it is likely to be used in case after case. Overturning an established practice on collateral attack could thus cause many convictions to be invalidated.

This Court has recognized that its decisions can be very disruptive to state criminal justice systems. Thus *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and *Escobedo* v.

Illinois, 378 U. S. 478 (1964) were not applied retroactively in part because doing so "would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson* v. *New Jersey*, 384 U. S. 719, 731 (1966). Similarly, in *Linkletter* v. *Walker*, 381 U. S. 618 (1965) an important reason why this Court chose not to apply *Mapp* v. *Ohio*, 367 U. S. 643 (1961) retroactively was to minimize the disruption of state justice systems. See 381 U. S., at 637.

The retroactivity doctrine of these cases has been abandoned, see *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), but its lesson remains. If settled practices are preserved under *Teague*, then the disruptive effect of decisions can be minimized without resorting to the disapproved jurisprudence of *Linkletter* and *Johnson*. If, however, established practices can be overturned at will on habeas corpus, the federal courts can and will seriously disrupt the administration of state judicial systems.

2. *Bright line rule.*

Another advantage of adopting a rule of automatic newness for rules overturning established state practices is that it will provide federal courts with a useful bright line to aid their interpretation of *Teague*. Bright line rules are normally directed at police. See *Dunaway* v. *New York*, 442 U. S. 200, 213-214 (1979). However, such rules also have value in providing courts with clear guidance, see *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979), and the present case amply demonstrates that such guidance is needed.

This Court has enunciated bright line rules in the Fourth Amendment's search and seizure law and the Fifth Amendment's self-incrimination law to aid in applying these complicated and changing bodies of law. The bright line rule is a useful device in these fields because it

provides the members of the criminal justice system with a clear standard to adhere to and interpret. See, *e.g.*, *New York* v. *Belton*, 453 U. S. 454, 458 (1981); *Fare*, *supra*, 442 U. S., at 718.

Determining when a rule is new under *Teague* is not an easy question. *Teague*, *supra*, 489 U. S., at 301. As the present case demonstrates, some federal courts will need help in making that determination. See part I, *ante*, at 4-12.

A bright line rule should make the law more specific, without unnecessarily changing the underlying standard which the rule seeks to apply. The rule proposed by *amicus* will improve the application of *Teague*. The determination that a practice is established is substantially less difficult than the current newness finding required by *Teague*.[7] To determine whether a state practice is established will rarely take more than a straightforward examination of state law. If the practice has been sanctioned for some significant time by the state courts, then it is established. If the state judiciary refuses to invalidate a practice that has gone on for some time, this too will demonstrate establishment. This was one reason the Illinois Supreme Court concluded that the instructions invalidated by *Reddick* were an established practice. See *People* v. *Flowers*, 561 N. E. 2d 674, 683 (Ill. 1990).

On the other hand, more traditional analysis of the relevant authority under *Teague* can be daunting. In the present case, the Seventh Circuit first engaged in an extensive analysis of how to best determine whether a rule is new. It first noted that any decision overruling a prior case of this Court created a new rule. Pet. App. 7; see *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990). It then recognized that few cases were clear cut enough to fall into this category. For most cases it is "more an art than

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7. In cases which do not involve an established practice, however, the present *Teague* analysis will still be necessary.

a science" to determine whether a case applies or departs from prior precedent. Pet. App. 7.

Next, the Seventh Circuit found two criteria in *Teague* for distinguishing new from old rules. First, it looked to whether lower federal and state courts disagreed with the proposed rule. *Id.*, at 8-9. Disagreement would be powerful evidence that the rule was "subject to debate among reasonable minds." *Id.*, at 8; see *Butler*, *supra*, 494 U. S., at 415.

Next, it looked to "the generality of the precedent underlying the decision at issue." Pet. App. 9. Heeding the warning against excessive generality in *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 207, 110 S. Ct. 2822, 2828 (1990), the Seventh Circuit set out to examine the generality of the precedent underlying the rule. If a precedent is more general, then there is more "latent ambiguity inherent in that precedent" and thus it is less likely to dictate a subsequent decision. Pet. App. 9.

The Seventh Circuit paid particular attention to this last criterion. It demonstrated that this Court made a similar use of generality in *Butler*. *Id.*, at 9-10. Furthermore, the Court below engaged in an extensive analysis of hypothetical applications of the generality principle. *Id.*, at 10-12.

In spite of the rigor and energy the Seventh Circuit brought to *Teague*, it failed miserably when the time came to apply it. The precedents that it found dictated *Falconer* were incapable of supporting this conclusion. See part I, *ante*, at 4-12. If this panel can stumble so badly, then other federal courts will do so as well.

Part of the problem may be the idiosyncratic nature of this Court's *Teague* jurisprudence. Beyond a few general principles derived from *Teague*, it is difficult to discern any common thread running through this Court's *Teague* cases. Each case after *Teague* has concentrated on analyzing the authority in the area of the law the rule in question is derived from. Thus most of this Court's

Teague jurisprudence on the newness question is a detailed analysis of death penalty law. See *Penry* v. *Lynaugh*, 492 U. S. 302, 316-328 (1989); *Saffle* v. *Parks*, 494 U. S. 484, 489-494 (1990); *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 206-211, 110 S. Ct. 2822, 2827-2831 (1990); *Stringer* v. *Black*, 117 L. Ed. 2d 367, 377-383, 112 S. Ct. 1130, 1135-1140 (1992). It is difficult to find much guidance from the subtle interplay of this Court's specialized death penalty precedents for analyzing a due process claim such as the one in the present case.

Teague is thus like other parts of the law that need bright line rules. Bright line rules are most needed where the law is heavily fact bound, requiring much case-by-case analysis. See, *e.g.*, *Belton*, *supra*, 453 U. S., at 458-459. *Teague* analysis, by being heavily oriented to the precedents relevant to the particular rule in question, is precedent oriented and thus subject to rule-by-rule analysis. Therefore, this Court's *Teague* jurisprudence would be well served by a bright line rule that can be applied across a broad spectrum of cases.

The established practice rule is such a bright line. If the case involves an established state practice, the only thing left for a federal court to do is see if the practice is in defiance of a prior precedent of this Court. Cf. *Yates* v. *Aiken*, 484 U. S. 211, 215-217 (1988) (no new rule question where the rule is virtually identical to precedent in effect at the time of conviction). For those cases involving established state practices, *Teague* will become much more straightforward to apply. Yet, as the next section demonstrates, the newness finding will be no less accurate.

B. Comports with Teague.

Teague strikes a compromise between the competing considerations most influenced by habeas corpus. *Teague* seeks to preserve habeas corpus' role in deterring states from violating current constitutional rules while at the

same time preserving the finality of state convictions. See *Teague* v. *Lane*, 489 U. S. 288, 308-310 (1989). Adopting this rule will continue habeas corpus' traditional role of deterring unconstitutional conduct while at the same time enhancing the finality of convictions. Therefore, the established practice rule is consistent with *Teague*.

The question of newness is decided by examining the underlying purpose of habeas corpus. See *Butler* v. *McKellar*, 494 U. S. 407, 413-414 (1990) (quoting *Teague*). The primary purpose of habeas corpus "is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings." *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990). Retroactive application of new rules cannot serve this purpose because it is impossible to deter a state court from violating a precedent that does not yet exist. See *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 206, 110 S. Ct. 2822, 2827 (1990).

Therefore, it is necessary to examine the newness question from the perspective of the state court confronted with defendant's claim. See *Saffle*, *supra*, 494 U. S., at 488. When a state court is confronted with a constitutional challenge to an established practice in use throughout the state, one of three possible conditions will exist. Either there will be a conflict of authority over the constitutionality of the practice; or there will be uniform authority upholding the practice; or the constitutionality of the practice will have been so universally accepted that no challenges exist. The first circumstance is governed by *Butler* v. *McKellar*. If authority is split over the propriety of the rule, then it will generally be "susceptible to debate among reasonable minds" and therefore new. *Butler*, *supra*, 494 U. S., at 415.

The second and third situations are even stronger cases for newness. If no authority can be found to challenge the established practice, then defendant's claim may even qualify as "novel" for the purpose of the

procedural default rule. See *Reed* v. *Ross*, 468 U. S. 1, 17, 19-20 (1984); *Engle* v. *Isaac*, 456 U. S. 107, 131-132 (1982). This is a far greater degree of "newness" than required by *Teague*.[8]

Another important aspect of the state court's decision to uphold the established practice is *stare decisis*. Just as people develop expectations in the continued existence of this Court's precedents, established state practices generate expectation interests. These interests are worth preserving and should be respected under *Teague*.

Overruling too many precedents will suspend the public's belief in the good faith of the judiciary. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 708, 112 S. Ct. 2791, 2815 (1992). Thus few precedents are overruled. This is demonstrated by this Court's practices where no more than a handful of precedents are overturned each year. Cf. *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991) (30 constitutional precedents have been overruled in whole or in part by this Court over the last 20 terms).

In addition to the public sense of stability promoted by adhering to *stare decisis*, upholding established rules also has a more direct influence on stability. Abandoning an established practice can be very disruptive to a state's criminal justice system. See part II A 1, *ante*, at 13-14. Confronted with these imperatives, a state court should be allowed to administer its practices at its own pace.

Stare decisis "is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts." *Payne*, *supra*, 115 L. Ed. 2d, at 742, 111 S. Ct., at 2613-2614 (Scalia, J., concurring). "The explicit overruling of an earlier holding

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8. The relationship between "newness" and "novelty" is examined in detail in the Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in *Selvage* v. *Collins*, No. 87-6700, 494 U. S. 108 (1990).

no doubt creates a new rule . . . ." *Saffle*, *supra*, 494 U. S., at 488. As preserving established practice is synonymous with preserving precedent, a rule overturning an established practice must be new.

This does not mean that state courts will use the established practice rule as a tool to ossify their criminal law. "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer*, *supra*, 111 L. Ed. 2d, at 210, 110 S. Ct., at 2831. Indeed, on the instruction in question in the present case, the Illinois Supreme Court decided to depart from its established practice without any prodding from a federal court. See *People* v. *Reddick*, 526 N. E. 2d 141 (Ill. 1988). All the Seventh Circuit did was to make the departure from the established practice much more disruptive than the Illinois high court intended. See part III, *post*, at 22-26.

Nor will *amicus*' proposed standard insulate fundamental miscarriages of justice from correction. *Teague* recognizes that in certain instances, the interests of justices will require retroactive application of new rules on habeas corpus. Thus *Teague* allows an exception for "watershed rules of criminal procedure" that implicates the fundamental fairness and accuracy of the trial. See *Teague*, *supra*, 489 U. S., at 311. This exception will keep the established practice rule from protecting such injustices. The classic example of a rule that would satisfy the second *Teague* exception, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), see *Saffle*, *supra*, 494 U. S., at 495, overturned an established state practice, see 372 U. S., at 337.

The threat of later reversal on federal habeas corpus is unlikely to deter the states from preserving established procedures. A state judiciary generally cannot be expected to devote resources to anticipating how the federal judiciary will rule on a constitutional issue. "[S]tate

courts cannot 'anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them.' " *Teague*, *supra*, 489 U. S., at 310 (quoting *Brown* v. *Allen*, 344 U. S. 443, 534 (1953) (Jackson, J., concurring in the result)). A state court will be even less willing to do so if it risks the certain disruption caused by overturning an established practice.

Teague preserves good faith interpretations of the Constitution by state courts. *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990). A court that follows an established state practice that has not been directly contradicted by any binding precedent is acting in good faith. " '[T]raditional ways of conducting government . . . give meaning' to the Constitution . . . ." *Mistretta* v. *United States*, 488 U. S. 361, 401 (1989) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610 (1952) (Frankfurter, J., concurring)). State government traditions, as embodied in established practices, warrant similar respect.

The retroactive overruling of an established state practice can do significant harm to the finality interest *Teague* seeks to protect. See *Teague*, *supra*, 489 U. S., at 309-310. By their nature, established practices are likely to be repeated throughout the system. Overturning such a practice is likely to implicate many convictions, leading to wholesale reversals of certain classes of convictions. For example, the instructions given in the present case were routinely given in Illinois murder prosecutions. See *People* v. *Flowers*, 561 N. E. 2d 674, 683 (Ill. 1990). The Seventh Circuit's retroactivity ruling thus calls into question hundreds of murder convictions in Illinois. *Flowers* v. *Illinois Dept. of Corrections*, 962 F. 2d 703, 707 (CA7 1992) (Easterbrook, J., concurring), cert. pending, No. 92-253. This unwelcome surprise will significantly harm the finality and deterrent effect of Illinois' most important criminal law. See *Teague*, *supra*, 489 U. S., at 309. The established practice rule can prevent such

surprises while preserving the deterrent value of habeas corpus.

III. The present case demonstrates the need to further protect established state practices under *Teague*.

The saga of Illinois' jury instructions shows that no good deed goes unpunished. The Illinois Supreme Court established a committee to promulgate model jury instructions to be used to guide the courts throughout the state. Its goal was to provide the courts with "simple, concise, unslanted and non-partisan instructions." Illinois Pattern Jury Instructions, Criminal vii (2d ed. 1981).

Illinois' high court did not rest in its quest to improve its criminal justice system. In *People* v. *Reddick*, 526 N. E. 2d 141, 144-146 (Ill. 1988), it held that the pattern instructions on murder and voluntary manslaughter erroneously stated the state's burden of proof regarding voluntary manslaughter.

In *Falconer* v. *Lane*, 905 F. 2d 1129 (CA7 1990), the *Reddick* decision was brought to the attention of the Seventh Circuit. The *Falconer* court found a constitutional dimension to the *Reddick* decision and thus found that the use of the pattern instructions condemned in *Reddick* violated due process. *Id*., at 1134. The court did not address the issue of retroactivity because the state did not raise the issue. *Id*., at 1137.

After *Falconer*, but before the present case, the Illinois Supreme Court sorted out the retroactivity of *Reddick*. In *People* v. *Flowers*, 561 N. E. 2d 674 (Ill. 1990), the Illinois Supreme Court held that *Reddick* did not apply retroactively on collateral review. The *Flowers* court found that *Reddick* did have a constitutional dimension. *Id*., at 681. Adopting the rationale of *Teague*, the Illinois Supreme Court determined that *Reddick* constituted a new rule and did not satisfy either of the *Teague* exceptions for retroactivity. *Id*., at 682-684..

The *Flowers* court had two reasons to hold that *Reddick* was new. First, it found that *Reddick*'s "conclusion did not necessarily flow from the statutory analysis" of Illinois' homicide laws given this Court's decision in *Patterson* v. *New York*, 432 U. S. 197 (1977). 561 N. E. 2d, at 683. The second reason that *Reddick* was new was that it upset an established practice.

> "Also, this 'result was not *dictated* by precedent existing at the time.' (Emphasis in original.) (*Teague*, 489 U. S. at 301, 109 S. Ct. at 1070, 103 L. Ed. 2d at 349.) Instead, the long-standing practice in the trial courts was to instruct the jury on murder and voluntary manslaughter consistent with the Illinois Pattern Jury Instructions." *Ibid*.

In *People* v. *Shields*, 575 N. E. 2d 538, 542-543 (Ill. 1991), Illinois completed the retroactivity puzzle, finding that *Reddick* was fully retroactive on direct review as it was a constitutional decision. See *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987). Illinois' decision to preserve most of its murder convictions while "treating similarly situated defendants the same," *id*., at 323, was overturned by the Seventh Circuit's decision in the present case to apply *Falconer* retroactively.

The court below paid no attention to the careful distinction the Illinois Supreme Court made between direct and collateral review. After the Seventh Circuit's decision that *Falconer* was not new, *Flowers* would not stop Illinois prisoners from collaterally attacking their murder convictions. Although they would be thwarted in state court, the Seventh Circuit would freely grant habeas where the pattern instructions were used, regardless of when the conviction was final.

The Illinois Supreme Court in *Reddick* decided on its own to re-examine the jury instructions it helped promulgate, finding them impermissibly prejudicial to the defendant. It then chose to vacate them, requiring courts to come up with instructions more favorable to defen-

dants.[9] It had not been told to re-examine its jury instructions by this Court or any other court.

Reddick in turn supplied the inspiration for *Falconer*. The *Falconer* court essentially adopted *Reddick* and added a constitutional patina. See 905 F. 2d, at 1136. In the present case, the Seventh Circuit simply determined whether to apply *Falconer* retroactively. See Pet. App. 2.

It is impossible to say that the Seventh Circuit never would have reached the *Falconer* holding had *Reddick* not been decided. Someone would have made a similar claim to the Seventh Circuit, and it could have reached the result of *Falconer* without the help of *Reddick*. But *Reddick* certainly gave the Seventh Circuit the inspiration that ultimately threatens many murder convictions. This inspiration made the Seventh Circuit's decision much easier. The security of favorable precedent is tempting. Once Illinois decided to question its murder instructions, the necessary leap for the Seventh Circuit to intrude upon this established practice became much smaller.

Reddick is now like an experiment that has blown up in the Illinois court's face. In *Reddick*, it decided to change a part of the criminal justice system to benefit defendants. In *Flowers* and *Shields*, it attempted to control the impact of the *Reddick* experiment, thus limiting the disruption caused by *Reddick*. The intervention of the Seventh Circuit turned the experiment into a failure by giving *Reddick* a much greater impact than the Illinois Supreme Court intended. Thus, Illinois is punished for its own good deeds.

The Illinois Supreme Court never explicitly stated in *Flowers* that it was acting to limit the impact of *Reddick*. Yet this was the effect of the *Flowers* decision and the likely reason for it. An important component of *Teague*

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9. The pattern instructions were modified to conform with *Reddick*. See Illinois Pattern Jury Instructions, Criminal 7.02B, 7.02C (2d ed. 1989 Supp.).

was preserving the state's interest in the finality of its convictions.

> "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague*, *supra*, 489 U. S., at 309.

Avoiding disruption is an important component of the finality interest. Applying new rules on collateral attack is particularly costly because "it *continually* forces the states to marshall resources in order to keep in prison defendants whose trials and appeals conformed to then existing constitutional standards." *Id.*, at 310 (emphasis in original). This cost is magnified if the new rule requires reversal of many state convictions, as many cases are brought up on habeas corpus and subsequently retried after habeas is granted.

"The essence of federalism is that states must be free to develop a variety of solutions and not forced into a common uniform mold." *Addington* v. *Texas*, 441 U. S. 418, 4311 (1979). The actions of the Illinois Supreme Court demolish the discredited nostrum that state courts are unwilling to protect criminal defendants under the Constitution. See *Butler* v. *McKellar*, 494 U. S. 407, 430, n. 12 (1990) (Brennan, J., dissenting). Yet it was penalized for its aggressive protection of defendants.

"The Supreme Court of Illinois decided to improve the mesh between murder and manslaughter, thinking that prospective application meant bearable costs . . . . From now on, prudence lies in perpetuating dubious instructions rather than improving them." See *Flowers* v. *Illinois Dept. of Corrections*, 962 F. 2d 703, 711 (CA7 1992) (Easterbrook, J., concurring), cert. pending, No. 92-253. If a state court runs the risk of having its criminal justice system significantly disrupted on federal habeas corpus, it will be much less willing to modify or abandon an estab-

lished practice. The present case will demonstrate that the state court cannot assure itself that it can control the impact of its own decision; it will have to hope that the federal circuit in which it resides does not repeat the *Falconer* process of adoption and retroactive application. Adopting the established practice standard for *Teague* will free states from this threat.

IV. The established practice test should not be prevented by *Penry* v. *Lynaugh*.

In *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989), this Court found that a Texas death penalty trial violated the Eighth Amendment because the jury had not been instructed that it could fully consider defendant's mitigating evidence. The *Penry* jury had been instructed in accordance with Texas' death penalty statute, which required the jury answer three special issues. If it unanimously answered yes to all three, then the trial court must impose the death sentence. *Id.*, at 310. In *Jurek* v. *Texas*, 428 U. S. 262 (1976), this Court found this same statutory system was constitutional. See *id.*, at 273-274 (plurality); *id.*, at 278-279 (White, J., concurring). The *Penry* Court found that its holding did not announce a new rule under *Teague* v. *Lane*, 489 U. S. 288 (1989). 492 U. S., at 319. This decision should not preclude established state practices from being protected by *Teague*.

Amicus recognizes that its proposed rule is inconsistent with the *Penry* decision. Texas had continued the practice of giving the statutory instructions first approved in *Jurek*. See *id.*, at 354 (Scalia, J., dissenting). Twelve years later, a narrow majority of this Court then determined that this practice was unconstitutional, sweeping away this established practice, while holding that the rule announced was not new. *Id.*, at 328.

In *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988), a plurality found that *Jurek* had unconditionally approved

the manner in which mitigating evidence is considered under the Texas statute. Footnote 10 of the *Franklin* opinion flatly rejects the precise argument later accepted in *Penry*. 487 U. S., at 180. The *Penry* Court dismissed this opinion, finding that five members of the concurrences and dissents in *Franklin* found that *Jurek* had not precluded a claim like the one made in *Penry*. *Penry*, *supra*, 492 U. S., at 320-321.

The force of the *Penry* decision, however, has been eroded by subsequent interpretations of *Teague*. In *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990), this Court recognized that the fact that a decision is " 'controlled' or 'governed' " by prior precedent does not prevent it from being new. Thus, if the outcome "was susceptible to debate among reasonable minds," the proposed rule must be new. *Id.*, at 415.

The *Penry* majority's approach is not consistent with *Butler*'s reliance on the disagreement of reasonable minds. If this Court is sharply divided over the propriety of the proposed rule, then under *Butler* it must be new. This point was driven home in *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 207-208, 110 S. Ct. 2822, 2828 (1990) where the dissent of three Justices in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) demonstrated that *Caldwell* announced a new rule. Thus, under the reasoning of *Butler* and *Sawyer*, *Penry* should have been decided differently given the disagreement in *Franklin*. This at least calls into question much of the reasoning of the *Teague* part of *Penry*.

Yet the adoption of a different approach to *Teague* "newness" analysis does not require overruling the specific holding of *Penry*. That issue has been decided, and there is no need to re-examine it. In *Teague* itself, for example, this Court refused to re-examine the holding of *Allen* v. *Hardy*, 478 U. S. 255, 258 (1986) (*per curiam*) that *Batson* v. *Kentucky*, 476 U. S. 79 (1986) did not apply retroactively. *Teague*, *supra*, 489 U. S., at 295-296. The *Allen*

holding was made under the retroactivity standard of *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and its progeny. See *Allen*, 478 U. S., at 258. Although the *Teague* Court overruled the *Linkletter* standard, it chose to leave *Allen* undisturbed.

As in *Teague*, it is not necessary to re-examine a prior retroactivity decision. While *Penry* is good law for the retroactivity of its own rule, there is no need to apply its "newness" approach to future cases. Instead, this Court should rely on *Teague* and the decisions made after *Penry* to set forth a rule that will make *Teague* a consistent, uniformly applied doctrine.

V. The rule imposed by the Seventh Circuit is new.

Falconer and the present case struck down the Illinois Pattern Jury Instructions on murder and voluntary manslaughter. See *Falconer* v. *Lane*, 905 F. 2d 1129, 1133 (CA7 1990); Pet. App. 1-2. It was the standard practice in Illinois "to instruct the jury on murder and voluntary manslaughter consistent with the Illinois Pattern Jury Instructions." *People* v. *Flowers*, 561 N. E. 2d 674, 683 (Ill. 1990). Therefore, applying the established practice test, the rule in *Falconer* finding these instructions unconstitutional is new under *Teague* v. *Lane*, 489 U. S. 288 (1989).

The same result would be reached without the test. The decisions cited by the Seventh Circuit to hold that *Falconer* was not new, *Boyde* v. *California*, 494 U. S. 370 (1990) and *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), are incapable of supporting the Seventh Circuit's conclusion. See part I, *ante*, at 4-12. The Seventh Circuit did not, however, cite the best supporting holding. *Beck* v. *Alabama*, 447 U. S. 625 (1980), while better for Taylor than the minimal authority cited by the Seventh Circuit, nonetheless does not dictate *Falconer*.

Beck held that a capital defendant could not be precluded from having the jury consider whether he was guilty of a lesser included offense. *Id.*, at 627. This arguably supports the notion that Illinois' instructions deprived defendant of having the jury give effect to his voluntary manslaughter claim. Yet the *Beck* Court limited its holding to capital cases, leaving open the question of whether there was a federal constitutional right to lesser included offense instructions in noncapital cases. *Id.*, at 638, n. 14. While this may "put a reasonable jurist on notice," that there may be a general right to lesser included offense instructions, see *Stringer* v. *Black*, 117 L. Ed. 2d 367, 388, 112 S. Ct. 1130, 1144 (1992) (Souter, J., dissenting), by no means does it dictate *Falconer*.

The *Beck* Court relied heavily upon this Court's capital punishment jurisprudence. See 447 U. S., at 637-640. The fact that it was a capital case was essential to the decision. See *id.*, at 637. There is a significant leap from this Court's capital jurisprudence to the rest of constitutional criminal procedure. Given *Beck*'s reliance on this very specialized part of the criminal law, it was at least "subject to debate among reasonable minds" as to whether *Beck* applied to noncapital cases. See *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990).

At the very least, the *Falconer* rule "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (emphasis in original). This is the same conclusion that would be reached by the straightforward application of the proposed established practice rule. The only difference is that it is more difficult for a court to misapply the established practice rule as badly as the Seventh Circuit misapplied *Teague* in the present case.

CONCLUSION

The decision of the Court of Appeals for the Seventh Circuit should be reversed.

November, 1992

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(7)

No. 91-1738

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

—v.—

KEVIN TAYLOR,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ILLINOIS IN SUPPORT OF RESPONDENT

Larry W. Yackle
(*Counsel of Record*)
Steven R. Shapiro
Leslie A. Harris
John A. Powell
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Harvey Grossman
Roger Baldwin Foundation of ACLU, Inc.
203 North LaSalle Street
Chicago, Illinois 60601
(312) 201-9740

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QUESTION PRESENTED

Did the Seventh Circuit correctly reject the argument that a "new rule" of constitutional law is necessary to hold that a habeas petitioner is in custody in violation of due process, when:

(a) state law barred a conviction for murder if the accused demonstrated sufficient passion and provocation to justify, instead, a conviction for manslaughter;

(b) the state trial judge found the accused's evidence of passion and provocation sufficient to require a jury instruction on manslaughter; and

(c) the judge then gave instructions that the state concedes may have led the jury to believe that it should convict the accused of murder even if it was persuaded that he had established the elements of manslaughter?

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Illinois is one of its statewide affiliates.

Both the ACLU and its affiliates have long supported the view that the habeas corpus authority of the federal courts is an important constitutional safeguard that enhances the concept of federalism. As that authority has come under attack in recent years, the ACLU has participated in numerous habeas cases before this Court.

In this particular case, the parties have focused on the particular due process claim raised by the respondent and whether the legal principles on which that claim rests were established when the respondent's conviction and sentence became final. This brief concentrates, more generally, on the definition of "new rules" underlying petitioner's argument and the implications of accepting that definition for this Court's approach to "retroactivity."

STATEMENT OF THE CASE

Kevin Taylor, the respondent before this Court, seeks federal habeas corpus relief on the ground that he is in custody in violation of federal law. He contends that the murder conviction on which his custody is based was obtained by violating his right to due process at trial in state court.

Under the law of Illinois, Taylor could be convicted only of manslaughter if: (1) the prosecution established

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

the elements of murder; but (2) Taylor established that he acted on a "sudden passion" brought on by "serious provocation." At trial, Taylor took the witness stand and gave evidence tending to show the necessary passion and provocation. The trial judge found Taylor's testimony sufficient under state law to command a jury instruction on manslaughter. However, the judge's actual instructions to the jury included a statement that the jury should convict Taylor of murder if it concluded that the prosecution had met its burden with respect to that offense.

Those instructions, the state now concedes, may have led the jury to believe that it should return a murder verdict even if it was convinced that Taylor had acted on passion and provocation warranting only a manslaughter conviction. Petitioner's Brief at 19-20. Taylor claims, accordingly, that the instructions given in this case effectively took the passion and provocation issues away from the jury. Specifically, Taylor claims that once the State of Illinois made passion and provocation decisive, and once the trial judge concluded that Taylor had adduced evidence that would allow the jury to find for him on those issues, the judge denied him due process by effectively preventing the jury from considering those very questions.

Petitioner Gilmore's response is that, however meritorious Taylor's due process claim may be, it cannot be considered in habeas corpus in light of *Teague v. Lane*, 489 U.S. 288 (1989), and other recent cases, holding that the federal habeas courts are barred in most instances from applying "new rules" of law. Relying specifically on a phrase from *Butler v. McKellar*, 494 U.S. 407 (1990), Gilmore contends that Taylor's due process claim demands the creation of "new" law because, at the time his conviction became final, the proper result with respect to that claim on the facts of this case was "susceptible to debate among reasonable minds." *Id.* at 415. After a careful review of this Court's decisions, the Seventh Circuit disagreed and issued a writ of habeas corpus.

SUMMARY OF ARGUMENT

This case is still another in an increasingly long series of cases in which this Court has been invited to dismantle, by indirection, the federal courts' statutory jurisdiction to determine whether state convicts are in custody in violation of federal law.[2] Here again, the matter at stake is clear: whether state convicts will continue to be entitled to meaningful access to the federal habeas courts for the adjudication of the merits of properly preserved claims.

Gilmore does not suggest that the Court should discard the federal courts' habeas jurisdiction forthrightly. Nor could he. Congress has the authority to prescribe the lower federal courts' jurisdiction in federal question cases. And in the Habeas Corpus Act of 1867, as amended, 28 U.S.C. §§2241-2255, Congress has plainly conferred on those courts the power and responsibility to receive applications from state prisoners and to adjudicate properly presented claims *de novo*. *Brown v. Allen*, 344 U.S. 443 (1953). A forthright argument that this Court should unilaterally jettison federal habeas corpus for state convicts would run directly into the role the Constitution assigns to the legislative branch.

Coming at the issue differently, then, Gilmore asks the Court to eviscerate the writ by transparently manipulating the law of "retroactivity" in criminal cases. Inasmuch as *Teague v. Lane*, 489 U.S. 288, and its progeny ordinarily prevent the federal habeas courts from an-

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[2] *See* Briefs *Amicus Curiae* of the ACLU in *Wright v. West*, __ U.S. __, 112 S.Ct. 2482 (1992), *Withrow v. Williams*, No. 91-1030 (argued Nov. 3, 1992), and *Brecht v. Abrahamson*, No. 91-7358 (argued Dec. 1, 1992).

nouncing or applying "new rules" of constitutional law, Gilmore invites the Court to consider virtually any claim a petitioner might raise in habeas to depend on a "new rule" and thus to be barred under *Teague*.

Gilmore's means to this end is a phrase from *Butler v. McKellar*, 494 U.S. 407, in which the Court suggested that a claim was *Teague*-barred because, at the time the prisoner's conviction had become final, the merit of his claim had been "susceptible to debate among reasonable minds." *Id.* at 415. Gilmore reads this formulation in *Butler* to endorse an extraordinary definition of "new rules" for *Teague* purposes: If a previous state judgment rejecting a prisoner's federal constitutional claim was "reasonable" in light of the precedents then in existence, a federal habeas court can reach a different result only by announcing and applying an entirely "new" rule of law. Since *Teague* bars "new rules" in most circumstances, the result of Gilmore's argument is that most ordinary claims are no longer cognizable in habeas corpus, *e.g.*, claims that ask the federal courts only to apply settled legal principles to the facts of analogous cases.

Gilmore's argument is wrong for a host of reasons. In effect, he contends that a federal court must defer to a state court judgment it believes to be erroneous, but not unreasonably so. Yet a federal habeas court does not, and cannot, strike any such deferential attitude toward a previous state judgment. By contrast, a federal habeas court is charged by statute to ensure that a state prisoner is lawfully in custody and, accordingly, that the state judgment asserted to justify that custody was *correct* -- not merely plausible -- at the time it was rendered.

To perform this function, the federal court must discover and enforce the federal legal principle that this Court would have applied on direct review of the state court judgment rejecting a prisoner's federal claim. That was, by definition, the prevailing legal standard at the critical time and is thus the appropriate standard in federal habeas corpus. To the extent the *Butler* formulation for "new rules" suggests that such a legal rule is "new" and thus unavailable in federal habeas merely because a state court "reasonably" failed to recognize and respect it, the *Butler* formulation is misconceived and must be revised. Last Term, in *Wright v. West*, 112 S.Ct. 2482, this Court declined to credit the very argument that Gilmore hopes to revive in this case. The Court should take this opportunity to lay such a fundamental misconception to rest, once and for all.

Taken literally, as Gilmore proposes, the *Butler* formulation fails as a general definition of "new rules." The idea that the federal courts create new law whenever they differ with previous "reasonable" state judgments is inconsistent with the very purpose of this Court's modern approach to "retroactivity." Justice Harlan's views on retroactivity, which were adopted in *Teague*, reflect two complementary and equally important principles. First, the federal courts should not upset state court judgments on the basis of changes in the law. Second, the federal courts must enforce existing law in order to deter the state courts from neglecting or misconstruing established federal rights. If the federal habeas courts were to defer to previous state judgments they believe to have been erroneous at the time, but not *unreasonably* so, they would fail to perform the very function that *Teague* and its progeny envision for them.

In addition, the *Butler* formulation, if taken literally, would undercut the federal habeas courts' congressionally established jurisdiction to determine the merits of properly presented federal claims. The relevant provisions of the Habeas Corpus Act, as amended, were reviewed at length in our *amicus curiae* brief in *Wright v. West*. Since then, the House Judiciary Committee has advanced bills in each of the last two sessions that would have explicitly repudiated the *Butler* formulation as a definition of "new rules." In the last Congress, the full

House approved such a provision, but final congressional action was frustrated by a filibuster in the Senate.

This Court's decisions recognizing that executive officers may have a qualified official immunity from liability in civil damages actions provide no support for the *Butler* formulation of "new rules" or Gilmore's reliance on it. When this Court has held that an executive officer is shielded from liability if he or she acted in the "reasonable" belief of lawful authority, the Court has assumed, *arguendo*, that the officer violated the plaintiff's rights. That the violation was "reasonable" does not make it any less a violation; it only indicates that a particular remedy (damages) may be inappropriate.

The *Butler* formulation embraced by Gilmore, by contrast, suggests that the "reasonableness" of a state court judgment makes that judgment *correct* (for habeas corpus purposes). This is an entirely different proposition that draws nothing from the official immunity cases. To accept the literal language of the *Butler* formulation would be to allow the state's desire to keep a prisoner from obtaining habeas corpus relief to skew the content of substantive federal constitutional law.

The "bright line" definition of "new rules" proposed by the Criminal Justice Legal Foundation (CJLF), as *amicus* for petitioner, would frustrate this Court's "retroactivity" doctrine even more dramatically than the *Butler* formulation. The CJLF proposes that a federal habeas court announces or applies a "new rule" of law whenever it determines a federal claim in a way that conflicts with a previous state disposition reflecting an "established state practice." CJLF Brief at 12. That understanding of "new rules" is completely inconsistent with this Court's decisions and constitutes yet another attempt to eviscerate habeas corpus for state prisoners.

Indeed, the "established practice" proposal is foreclosed by *Penry v. Lynaugh*, 492 U.S. 302 (1989). The

CJLF's attempts to avoid *Penry* are both feeble and internally inconsistent. This Court did not overrule *Penry* simply by using the "reasonable minds" phrase in *Butler v. McKellar*. Nor can the Court simply ignore *Penry* and adopt a definition of "new rules" that sharply departs from the understanding apparent in that recent precedent.

Finally, the "established practice" proposal would compound the threat already posed by the *Butler* dictum. The CJLF argues that the federal courts should cease to ask even about the "reasonableness" of a prior state judgment and should, instead, accept an "established state practice" without examination. That idea is even more destructive to this Court's precedents than the argument that Gilmore gleans from *Butler*. Gilmore contends that the federal courts should defer to previous state judgments that were erroneous, so long as they were not *unreasonably* so. In effect, the CJLF proposes that the federal courts should defer even to *unreasonable* state judgments, so long as they were *consistently* so.

ARGUMENT

I. THE EXPANSIVE DEFINITION OF "NEW RULES" ADVANCED BY PETITIONER WOULD FRUSTRATE THE PURPOSE OF RETROACTIVITY DOCTRINE AND EVISCERATE THE FEDERAL HABEAS COURTS' STATUTORY OBLIGATION TO ENFORCE SETTLED PRINCIPLES OF CONSTITUTIONAL LAW

In *Teague v. Lane*, 489 U.S. 288, this Court drew a crisp distinction between cases that have not yet run the full course of direct review (including any *certiorari* review in this Court) and thus are not yet "final," and cases that have exhausted all avenues of direct review and thus are "final" and subject only to collateral attack (in feder-

al habeas corpus).[3] In cases in the first category, properly presented claims are adjudicated on the basis of current standards of federal constitutional law, even if those standards depart (incrementally or sharply) from prior understandings. In cases in the latter category, by contrast, claims are now adjudicated on the basis of the federal legal standards that prevailed at the time the petitioner's conviction became final. Thus, the federal habeas corpus courts are largely barred from announcing or retroactively applying "new rules" of federal constitutional law.

Teague v. Lane adopted Justice Harlan's argument that the federal habeas courts' function is to deter the state courts from neglecting prisoners' federal rights and thus to ensure that those courts "conduct their proceedings in a manner consistent with established constitutional standards." *Id.* at 306, *quoting Desist v. United States*, 394 U.S. 244, 262-63 (1969)(Harlan, J., dissenting). The very point of *Teague* is that the federal courts are to determine whether a petitioner's conviction "rests upon [a] *correct* application of the law in effect at the time." *Teague v. Lane*, 489 U.S. at 306-07 (emphasis added), *quoting Solem v. Stumes*, 465 U.S. 638, 653 (1984)(Powell, J., concurring in the judgment).

Justice O'Connor reiterated this point last year in *Wright v. West*:

> [W]e have [never] held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment).[4]

To accomplish its purpose, *Teague* assigns carefully considered roles to the state and federal courts. A state court's task is to determine a properly presented federal claim in the way this Court would decide it on direct review of the state court's judgment.[5] If the state court finds a claim without merit, and the prisoner raises it in federal habeas corpus later, the federal court's task is to ensure that the state court actually *did* determine the claim in the way this Court would have -- if the matter had reached this Court on direct review at that time.[6] Under *Teague*, however, the federal habeas court cannot hold the state court to any change in the law that this Court might have announced in a subsequent opinion decided after the judgment in the case at bar became final.

If the federal habeas court concludes that the state court rejected a claim that this Court would have found

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[3] *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)(explaining that a conviction judgment is "final" when the "availability of appeal [has been] exhausted, and the time for a petition for *certiorari* [has] elapsed or a petition for *certiorari* [has been] finally denied." *Accord Penry v. Lynaugh*, 492 U.S. at 314 (1989)(explaining that a prisoner's conviction had not become final until this Court denied *certiorari*).

[4] *Accord id.* at 2499 (Kennedy, J., concurring in the judgment)(stating that the federal courts are not to upset a state judgment that was "correct" at the time a petitioner's conviction became final).

[5] If this were not true, this Court would not routinely reverse state decisions found to be erroneous. Of course, this Court is no longer a court of error, and most state criminal cases are not candidates for direct review here.

[6] *Accord Desist v. United States*, 394 U.S. at 264 (Harlan, J., dissenting)(explaining that it would be "very difficult to argue" that a rule was "new" unless it could be said "with . . . assurance that this Court would have ruled differently at the time the petitioner's conviction became final").

meritorious on direct review, then the federal court can award relief without announcing or applying a "new rule." For the rule of law on which the federal court grants relief in such a case is *not* "new" at all but is, by definition, the very rule that prevailed at the time the petitioner's conviction and sentence became final.

In this case, Gilmore asks the Court to adopt an extremely expansive definition of "new rules" and, in that way, to channel a familiar claim, grounded in settled due process principles, out of the federal habeas forum on the specious ground that it can succeed only if the federal court changes the meaning of due process from what it was at the time Taylor's conviction became final. The tortured argument that must be made (and accepted) to reach such a result is an exercise in subterfuge. Put bluntly, Gilmore invites the Court to put the federal habeas courts out of business by the back door and thus to frustrate the aims of the Habeas Corpus Act.

The object Gilmore has in view is quite clear. He would eliminate a federal court's ability and duty to exercise its own, independent judgment on the merits of a prisoner's claim in light of the then-prevailing federal legal standard. Instead, he contends, the federal courts should defer to any state court decision that can be considered "reasonable" on any issue with respect to the merits (factual, legal, and "mixed"). Only in the exceptional case, in which a state court flagrantly disregards clearly established principle, should the federal courts have authority to award federal relief. *See* Petitioner's Brief at 22.

To achieve this objective, Gilmore advances the extravagant proposition that a federal habeas court creates "new" federal constitutional law whenever it reaches a result in a particular case that differs from a "reasonable" state court judgment.[7] Gilmore proposes that such a prior state court judgment fixed the baseline of then-prevailing federal law from which the departure contemplated by a "new rule" can be measured. That notion, in turn, makes a state court judgment that was merely within the bounds of reason serve, in effect, as a *correct* judgment -- as though there were no basis for demanding that the state court decide a question of federal constitutional law in the way this Court would have at the time. This argument, if adopted, would subvert the purpose served by *Teague*'s approach to retroactivity.

Gilmore insists that this Court's cases on what counts as a "new rule" have already corrupted *Teague* in the way he envisions. Grasping a phrase from *Butler v. McKellar*, Gilmore contends that a prisoner's claim in federal habeas corpus requires the application of a "new rule" any time the result for which the prisoner argues was "susceptible to debate among reasonable minds" when the state courts rejected it. 494 U.S. at 415. On this basis, Gilmore argues that any state court judgment that *was* "reasonable" is entitled to deference in federal habeas.

By Gilmore's account, the *Butler* definition of "new rules" absorbs "old rules" as well and, indeed, cases in which "old rules" are merely applied to the facts of analogous cases. Within his scheme, federal habeas corpus is now merely a figurative safety net, catching only scandalous cases in which the state courts flagrantly disregard well-established principles of constitutional law. Such a contention cannot be sustained.

This Court has never presented the "reasonable minds" formulation in *Butler* as a tidy test for "new

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[7] In a properly functioning system of law, most state court judgments will be "reasonable" in the sense that Gilmore suggests. Gilmore's proposal would, therefore, leave the federal habeas courts with virtually no role at all.

rules," to be mechanically invoked in every case. If the federal habeas courts were to accept (as close enough) state judgments that are erroneous, but not "unreasonably" so, those courts would shirk the very function that *Teague* and its progeny assign to them. They would not evaluate competing "reasonable" results and choose the one that was *most* reasonable and, therefore, the best interpretation of federal rights at the time. Instead, they would permit the state courts to pick any marginally defensible result they like and to insulate that result from federal oversight in habeas corpus. A regime of that kind would be entirely inconsistent with *Teague*. It makes no sense to define "new rules" for purposes of "retroactivity" analysis in a way that thwarts the ultimate objective that analysis seeks to achieve.

II. *BUTLER v. McKELLAR* MUST BE REVISED TO THE EXTENT IT SUGGESTS THAT THE FEDERAL HABEAS COURTS MUST DEFER TO "REASONABLE" STATE COURT JUDGMENTS AND THUS PUTS RETROACTIVITY DOCTRINE ON A COLLISION COURSE WITH THE HABEAS CORPUS ACT

If Gilmore is right and *Butler* truly suggests that a federal habeas court must forge a "new rule" of law in order to reach a conclusion different from a previous "reasonable" judgment rendered in state court, then the reasoning of *Butler* must itself be reversed. The federal habeas courts cannot, in form or in substance, simply defer to prior state judgments said to be "reasonable" in the circumstances.

Most fundamentally, the proposition that the federal habeas courts must defer to "reasonable" state court judgments flies in the face of the subject matter jurisdiction that Congress has conferred. In a long line of decisions stretching back to *Moore v. Dempsey*, 261 U.S. 86 (1923), running through *Brown v. Allen*, 344 U.S. 443,

and continued in *Miller v. Fenton*, 474 U.S. 104 (1985), this Court has consistently construed the Habeas Corpus Act to oblige the federal habeas courts to exercise independent, *de novo* judgment on the merits of prisoners' federal claims -- including, most especially, the application of settled legal standards to the facts of particular cases. *Accord Wright v. West*, 112 S.Ct. at 2488-89 (opinion for the Court by Thomas, J.).

Over the same period, Congress has both acquiesced in this Court's constructions of the Act and, in legislation enacted in 1966, codified those interpretations. We traced these developments in our *amicus curiae* brief in *Wright v. West*, and need not repeat the matter here.[8]

It is pertinent, however, to review the reception the "reasonable minds" formulation in *Butler* has had in Congress over the last two sessions. That reception has scarcely been warm. Congress has continued to resist habeas corpus "reforms" proposed by the Bush Administration, which would lead to the result suggested by the *Butler* formulation for "new rules." More affirmatively, the House of Representatives has twice passed a bill that would explicitly reject the *Butler* formulation -- for the very reason that, taken literally, it would undercut the federal courts' authority to determine ordinary claims on the merits.

In the 101st Congress, and again in the 102d Congress, the Bush Administration advocated the central feature of the "reform" program originally pressed by President Reagan -- a proposal to require the federal courts to defer to "full and fair state court adjudication"

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[8] Other *amicus* briefs in *West* also reviewed the same legislative history and drew the same conclusion: Congress has prescribed *de novo* adjudication in habeas corpus. *E.g.*, Brief for Benjamin R. Civiletti, *et al.*; Brief for Gerald Gunther, *et al.*; Brief for Senator Biden and Rep. Edwards; and Brief for the American Bar Association.

of prisoners' federal claims.[9] By all accounts, that plan would have forced the federal habeas courts to accept a previous state court judgment meeting a "minimum standard of reasonableness."[10]

In the 101st Congress, both the Senate and the House adopted omnibus anti-crime bills that included habeas corpus reforms, but omitted the "full and fair adjudication" proposal.[11] In the 102d Congress, the Senate adopted an amendment that did include a "full and fair" provision,[12] but the House squarely rejected the idea.[13]

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[9] 137 Cong. Rec. S8659 (June 26, 1991)(Richard Thornburgh to Strom Thurmond).

[10] *The Habeas Corpus Reform Act of 1982: Hearing on S.2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 95 (Apr. 1, 1982)(attachment to testimony of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy). For repetitions of this explanation of the "full and fair" plan by the Department of Justice under President Bush, *see* H.R. Rep. No. 102-242, 102d Cong., 1st Sess. 394 n.2 (1991).

[11] 136 Cong. Rec. S6833-34 (May 23-24, 1990); 136 Cong. Rec. H8876-81 (Oct. 4, 1990).

[12] 137 Cong. Rec. S8660-61 (June 26, 1991).

[13] 137 Cong. Rec. H8005 (Oct. 17, 1991). In order to blunt opposition to the "full and fair adjudication" plan in the House, Rep. Henry Hyde offered to define "full and fair" in a revised version of the President's program he offered on the floor. Rep. Hyde proposed, *inter alia*, that a state judgment should not be considered sufficient under the "full and fair" standard if it was "contrary to or involved an arbitrary or unreasonable interpretation or application of clearly established Federal law." 137 Cong. Rec. H7996 (Oct. 17, 1991). That definition scarcely satisfied critics of the "full and fair" plan. Rep. Hamilton Fish, the ranking minority member of the House Judiciary Committee, responded that, if that was what "full and fair" adjudication meant, then it was clearer than ever that that plan would mean the evisceration of the writ for state convicts. *Id.* at H8001. It was at that point that the full House rejected Rep. Hyde's position in favor of the provision in H.R. 3371, quoted in the text below. *See* p.16-17, *infra*.

Thus, the Bush Administration was no more successful than its predecessor in obtaining legislative assent to a rule that the federal habeas courts should defer to "reasonable" state court decisions on prisoners' federal claims. If, then, the *Butler* formulation for "new rules" were now to be read to establish such a deference rule by indirection, this Court's approach to "retroactivity" would effectively enact a radical change in the federal courts' statutory jurisdiction -- in the teeth of Congress' own repeated refusals to take such a step legislatively.

Moreover, the House of Representatives has expressly repudiated any such use of *Butler*. In the 101st Congress, the House Judiciary Committee reported a crime bill that would have added the following provision to the habeas corpus chapter of the United States Code:

> (a) Except as provided in subsection (b) of this section, each claim under this chapter shall be governed by the law existing on the date the [federal habeas] court determines the claim.
>
> (b) In determining whether to apply a new rule, the court shall consider -- (1) the purpose to be served by the new rule; (2) the extent of the reliance by law enforcement authorities on a different rule; and (3) the effect on the administration of justice of the application of the new rule.
>
> (c) For purposes of this section, the term "new rule" means a sharp break from precedent, announced by the Supreme Court of the United States, that explicitly and substantially changes the law from that governing at the time the claimant's sentence became final. *A rule is not new merely because, based on precedent existing before the rule's*

> *announcement, it was susceptible to debate among reasonable minds . . . .*

H.R. 5269, 101st Cong., 2d Sess. §1305 (1990)(emphasis added).

An accompanying committee report explained that the purpose of this provision was to ensure that "new rules" of law continue to be genuine changes in the law, *i.e.*, sharp breaks from the past, and explicitly to refute the formulation in *Butler* as a test for "new rules:"

> [T]his subsection explicitly disclaims the statement in *Butler v. McKellar*, *supra*, that a rule is new if its [*sic*] was "susceptible to debate among reasonable minds" at the time the petitioner's sentence became final. That definition is far too broad to capture only the unanticipated breaks with the past that constitute genuine "new rules."

H.R. Rep. No. 101-681, 101st Cong., 2d Sess. 126 (1990).[14] An amendment on the floor deleted this provision and, in the end, no habeas corpus reform legislation was enacted by the 101st Congress.

However, in a similar crime bill in the 102d Congress, the House Judiciary Committee offered another proposal that departed from the previous year's bill in some respects, but retained language clearly meant to repudiate any suggestion in *Butler* that the federal courts create "new rules" whenever they differ with "reasonable" results in state court:

> In an action under this chapter, the court shall not apply a new rule. For purposes of this section, the term "new rule" means a clear break from precedent, announced by the Supreme Court of the United States, that could not reasonably have been anticipated at the time the claimant's sentence became final in State court.

H.R. 3371, 102d Cong., 1st Sess. §1104 (1991).

An accompanying report explained that the purpose of this provision was again to disclaim the "reasonable minds" line in *Butler* as a general definition of "new rules" for these purposes:

> This section clarifies the meaning of a "new rule" of law for purposes of *Teague v. Lane* and subsequent decisions, particularly *Butler v. McKellar* . . . . Certainly, the State courts are expected fairly to apply the general principles established by precedent to analogous cases . . . . *Accordingly, this section rejects the definition of a "new rule" suggested in Butler, namely that a rule is "new" if, at the time the State courts considered a petitioner's claim, the claim was susceptible to debate among reasonable minds.*

H.R. Rep. No. 102-242, 102d Cong., 1st Sess. 129-30 (1991) (emphasis added).[15]

The House adopted this second proposal to repudiate the *Butler* formulation and included it in the House

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[14] In addition, of course, this provision would have restored pre-*Teague* standards for determining whether rules identified as "new" should be applied retroactively -- displacing the Court's blanket prohibition on retroactive application, with two narrow exceptions.

[15] This report in the 102d Congress explicitly referred readers to the language quoted above from the House Judiciary Committee's report in the 101st Congress for a fuller explanation of why the *Butler* formulation is unacceptable. *See also* H.R. Rep. No. 102-242, *supra* at 395 (dissenting views)(criticizing the Judiciary Committee bill for rejecting the *Butler* formulation).

crime bill for the 102d Congress.[16] The conference committee (appointed to reconcile the House action with that of the Senate) accepted the House language on habeas corpus. The House then adopted the conference committee report but a filibuster in the Senate, apparently fueled by opposition to weapons-control provisions and a veto threat from President Bush, frustrated final action on the report in that body.[17]

It is true that, in the end, the 102d Congress failed actually to overrule the *Butler* formulation for "new rules" by statute. Yet the import of the actions taken by the House of Representatives, and by the conference committee, is perfectly plain. But for the President's opposition and the filibuster rule in the Senate, it is extremely likely that Congress would have disapproved the *Butler* formulation explicitly.

In these circumstances, the Court would hardly show proper respect for majoritarian policymaking if it were now to take the very formulation that has ignited such opposition in the legislative branch to be the general test for "new rules" within this Court's "retroactivity" framework.

III. THE *BUTLER* FORMULATION DRAWS NO PERSUASIVE POWER FROM AN ANALOGY TO THIS COURT'S CASES ON OFFICIAL IMMUNITY IN CIVIL ACTIONS FOR DAMAGES

The suggestion in *Butler* that state court judgments on federal claims are immune from federal oversight in habeas corpus as long as they are "reasonable" bears a

[16] 137 Cong. Rec. H8005 (Oct. 17, 1991).

[17] 137 Cong. Rec. H11756 (Nov. 26, 1991); 138 Cong. Rec. S6226 (Oct. 2, 1992)(reporting a final unsuccessful cloture vote).

superficial, linguistic similarity to this Court's articulation of executive officers' official immunity from liability in civil actions for damages, so long as they could "reasonably" have believed that their actions were lawful. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). There is, however, no basis for drawing an analogy from the official immunity cases in support of the *Butler* formulation in habeas corpus. While the words the Court uses to describe the scope and content of official immunity are similar, the *reason* for using the same words in that context is fundamentally different.

In official immunity cases like *Anderson*, the Court assumes (for purposes of discussion) that the action taken by the defendant violated the plaintiff's rights. For if the defendant's behavior was lawful, there is no substantive basis for liability, and thus no need to determine whether the defendant should be immune from liability that would otherwise obtain. When, then, the Court has held that an officer is entitled to immunity if he or she acted "reasonably," it has scarcely suggested that a finding of such "reasonableness" somehow erases the unlawful behavior that triggered the immunity question in the first place. The two issues (a threshold violation of the plaintiff's rights and the defendant's immunity from a damages claim) are entirely distinguishable. They are related only in that the one (the immunity question) presupposes the other (a violation that would otherwise give rise to liability).

In the context of "retroactivity" analysis in habeas corpus, by contrast, the alleged violation of a petitioner's federal rights is not assumed at all, but rather constitutes the central matter in issue. When *Butler* suggests that the federal courts must defer to "reasonable" state court judgments, it ostensibly proposes that if the state courts did act "reasonably," they acted *correctly*. There was, then, no violation of the petitioner's rights.

Such a proposition is utterly at odds with common understandings of the judicial function. *Judicial* decisions are not correct because they are reasonable; they are reasonable only if they are correct. *See Wright v. West*, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment). In this legal system, we regret judicial error; we do not celebrate it by abandoning the pursuit of correct results and insisting that we are perfectly satisfied with judicial decisions that are close enough.

Accordingly, any attempt to support *Butler*'s "reasonable minds" formulation of "new rules" (which necessarily goes to whether a state court decision was correct at the time it was rendered) by analogy to *Anderson*'s "reasonableness" standard for qualified immunity (which posits a violation of federal rights and addresses the propriety of a damages remedy) misconceives the very point of *Butler*, *Anderson*, or both.

Nor can the *Butler* formulation of "new rules" be rescued by reconceptualizing its objective to track the purpose served by the "reasonableness" standard in *Anderson* -- namely, to shield public officials from suits for damages that visit personal liability unfairly and generate perverse incentives.

In official immunity cases, it may be unrealistic to expect executive officers in the field to be keenly aware of the nuances of the legal standards for their conduct. Particularly when those standards are constitutional in nature, and thus are often diffuse, even the most responsible officer may be hard-pressed to appreciate fully where his or her authority extends in close situations. Thus, executive officers who act on a "reasonable" belief in their authority may be entitled to the benefit of the doubt.

In the habeas context, however, state judges are expected to be fully aware of the legal standards they are charged to enforce. Moreover, they are not exposed to

any risk of suit for damages stemming from their decisions. They are called to account for their judgments only in the common and essential sense that other courts, with jurisdiction to determine the same claims on appeal or in habeas corpus, may conclude that they have reached the wrong result. That, however, is a risk that all inferior court judges engage every day, and necessarily so.[18]

There is, then, no basis for treating state judges like police officers. The justifications for insulating administrative officials from personal liability when they act unlawfully, but in the reasonable belief that they have authority, are entirely absent in the habeas corpus context, in which state courts can be, and are, expected to reach correct judgments regarding federal rights in light of the legal standards prevailing at the time of decision.

It is one thing to say that a state executive officer should not be personally liable for damages even if he or she violates a citizen's federal rights when the officer reasonably thought the action was lawful. It is quite another to say that a state court that "reasonably" misjudges a federal constitutional claim itself, and erroneously sends a citizen to prison, should be insulated from federal oversight in habeas corpus. It would be perverse in the extreme to visit the consequences of judicial error on the victim of that error.

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[18] If there is any analogy to civil suits, it is not to damage actions against government officials sued in their individual capacity, where *Anderson* applies, but to equitable actions against government defendants sued in their official capacity, where no immunity attaches. *Cf. Preiser v. Rodriguez*, 411 U.S. 475 (1973)(finding habeas corpus indistinguishable in principle from a civil action for an injunction that would reduce the duration of a petitioner's confinement); *Pulliam v. Allen*, 466 U.S. 522 (1984)(holding that neither state executive officers nor state judges are immune from civil suits to enjoin actions taken in their official capacity).

IV. THE SO-CALLED "BRIGHT LINE" DEFINITION OF "NEW RULES" PROPOSED BY THE CRIMINAL JUSTICE LEGAL FOUNDATION IS UTTERLY INCOMPATIBLE WITH THIS COURT'S RETROACTIVITY CASES

The Criminal Justice Legal Foundation, in an *amicus* brief urging reversal of the decision below, advances the astonishing argument that a federal habeas corpus court creates entirely "new" federal constitutional law whenever it reaches a result that conflicts with an "established state practice." CJLF Brief at 12.[19] Such a "bright line" definition of "new rules" for "retroactivity" purposes, *id.* at 14, would work a monumental distortion of the framework this Court has developed in *Teague* and subsequent cases.

First, the "established practice" rule is plainly precluded by *Penry v. Lynaugh*, 492 U.S. 302, in which this Court concluded that it need not announce a "new rule" in order to hold that a longstanding jury instruction in Texas violated the Eighth Amendment. *See* CJLF Brief at 26 (candidly admitting that the "established practice" test is "inconsistent with . . . *Penry*").

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[19] With respect to this case, the CJLF contends that Taylor's due process claim demands the creation of a "new rule" of law. Specifically, the CJLF insists that the Seventh Circuit erroneously concluded that its own decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), did not change the law, but merely followed precedents already on the books. We leave that argument to the parties. Suffice it to say here that neither the novelty, nor even the validity, of the holding in *Falconer* is dispositive of the question in this case. The only issue here is whether the legal standard on which Kevin Taylor now claims federal habeas corpus relief has roots in the legal standard that prevailed at the time his conviction became final. That, in turn, was the legal standard that this Court would have invoked if it had accepted *this case* on direct review at the time. Undue focus on *Falconer* or any other lower court decision only distracts from that inquiry.

The CJLF attempts to evade *Penry*, of course, but the effort is scarcely credible. Specifically, the CJLF insists that the Court need not overrule *Penry* here because the "reasonable minds" formulation in *Butler v. McKellar*, 494 U.S. 407, has already "eroded" the "force" of the *Penry* decision. That argument, however, is entirely unpersuasive. The CJLF asks the Court to believe that within a few months after the *Penry* case and without the slightest acknowledgement of what it was doing, this Court repudiated that decision *sub silentio* simply by using the "reasonable minds" phrase. That phrase is already carrying far too much baggage in this case; it scarcely can bear this weight as well.

Moreover, the "established practice" rule would sacrifice the objective this Court's "retroactivity" doctrine is meant to achieve in the name of administrative convenience. Once again, the purpose of *Teague* is to ensure that the state courts respect the federal legal principle prevailing at the time they determine a prisoner's claim. To do that, a federal habeas court must ascertain what that principle was and apply it to the prisoner's claim.

No one proposes that the federal court's task will always be easy; indeed, it will often be difficult.[20] Yet to suggest that this Court can artificially *make* the task easy by telling the federal habeas courts to defer to "established state practices" is to suggest that the effort be abandoned entirely. It might as easily be proposed that, in order to render "retroactivity" cases less burdensome,

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[20] *Cf. Wright v. West*, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment)(noting that a federal court may have to devote significant "time and effort" to the task of determining the rule to be applied in federal court).

the federal courts should be instructed to conclude *either* that prisoners' claims never rest on "new rules" or that they always do.[21]

In truth, the "established practice" proposal advanced by the CJLF approaches the latter extreme. For when a state court denies relief on a federal claim, it may typically rely on a state precedent in support. It follows in most situations that the kind of "established practice" the CJLF has in mind could readily be demonstrated. CJLF Brief at 15 (suggesting that any practice "sanctioned for some significant period of time" would suffice).

Finally, the "established practice" rule would compound the error already threatened by Gilmore's extension of the "reasonable minds" dictum in *Butler*. The CJLF would not have a federal court examine such an "established practice" and decide even whether it reflects so much as a "reasonable" approximation of the federal constitutional standard that actually prevailed at the time a petitioner's conviction became final. That would defeat the CJLF's purpose to "improve" on the guidance that *Teague* and *Butler* provide by offering the federal courts a "bright line" to follow. Rather, the idea is simply to tell the federal courts that if they conclude that a

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[21] *Cf. Desist v. United States*, 394 U.S. at 268 (Harlan, J., dissenting) (emphasis added):

> It is doubtless true that a habeas court encounters difficult and complex problems if it is required to chart out the proper implications of the governing precedents at a time of a petitioner's conviction. One may well argue that it is of paramount importance to make the "choice of law" problem on habeas as simple as possible, applying each "new" rule only to those cases pending at the time it is announced. While this would obviously be simpler, simplicity would be purchased at the costs of compromising the principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction.

state practice was "established," they must defer to a previous state court judgment resting on that practice.

The result of any such program would be grotesque. Gilmore suggests that the federal habeas courts should no longer determine whether previous state judgments were correct when rendered, but should accept as sufficient any state judgment that was not *unreasonable*. The CJLF proposes that the federal courts should cease being concerned even that a state judgment was *unreasonable*, but should ask only whether it was consistent with state practice. There is simply no way for the Court to accept that invitation without abandoning both principle and the Habeas Corpus Act.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Larry W. Yackle
(*Counsel of Record*)
Steven R. Shapiro
Leslie A. Harris
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Harvey Grossman
Roger Baldwin Foundation
of ACLU, Inc.
203 North LaSalle Street
Chicago, Illinois 60601
(312) 201-9740

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No. 91-1738

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

JERRY D. GILMORE,

Petitioner,

—vs.—

KEVIN TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE ON BEHALF OF NICHOLAS deB. KATZENBACH, EDWARD H. LEVI, et al. IN SUPPORT OF THE RESPONDENT

GEORGE N. LEIGHTON
111 W. Washington Street
Suite 1700
Chicago, Illinois 60602

GEORGE H. KENDALL*
99 Hudson Street
16th Floor
New York, New York 10013

Counsel for *Amici Curiae*

*Counsel of Record

BEST AVAILABLE COPY

AMICI CURIAE

Philip S. Anderson, Attorney

Birch Bayh, Former United States Senator, Indiana

Hyman Bookbinder, Washington Representative Emeritus, American Jewish Committee

John Buchanan, Former Member of Congress, Alabama

Haywood Burns, Dean, City University of New York School of Law at Queens College

Julius L. Chambers, Chancellor, North Carolina Central University

Dick Clark, Former United States Senator, Iowa

John H. Curtin, Jr., Former President, American Bar Association

Lloyd N. Cutler, Former Counsel to the President

Drew S. Days, III, Former Assistant Attorney General of the United States

John A. Dixon, Jr., Former Chief Justice, Louisiana Supreme Court

John W. Douglas, Former Assistant Attorney General of the United States

Robert F. Drinan, S.J., Former Member of Congress, Massachusetts

Raymond Ehrlich, Former Chief Justice, Florida Supreme Court

Arthur J. England, Jr., Former Chief Justice, Florida Supreme Court

Marvin E. Frankel, Former Judge, United States District Court, Southern District of New York

John Hope Franklin, James B. Duke Professor of History Emeritus, Duke University

Don Fraser, Mayor, Minneapolis, Minnesota

Stanley H. Fuld, Former Chief Judge of the New York Court of Appeals of the State of New York

John J. Gibbons, Former Chief Judge, United States Court of Appeals for the Third Circuit

William A. Grimes, Former Chief Justice, New Hampshire Supreme Court

Joseph R. Grodin, Former Associate Justice, California Supreme Court

Shirley M. Hufstedler, Former Judge, United States Court of Appeals for the Ninth Circuit

Thomas L. Johnson, Former County Attorney, Hennepin County, Minnesota

Barbara Jordan, Former Member of Congress, Texas

Robert W. Kastenmeier, Former Member of Congress, Wisconsin

Nicholas deB. Katzenbach, Former Attorney General of the United States

Richard H. Kuh, Former District Attorney, New York County

Philip A. Lacovara, Former Deputy Solicitor General of the United States

William M. Leech, Jr., Former Attorney General, Tennessee

Edward H. Levi, Former Attorney General of the United States

Arthur L. Liman, Former Chief Counsel, Senate Select Committee on Investigation of Military Sales to Iran/Contra

Hans L. Linde, Retired Justice, Oregon Supreme Court

Robert MacCrate, Former President, American Bar Association

James F. Neal, Former United States Attorney, Tennessee

John H. Pickering, Attorney

Jack Pope, Former Chief Justice, Texas Supreme Court

Robert D. Raven, Former President, American Bar Association

Whitney North Seymour, Jr., Former United States Attorney, Southern District of New York

James M. Shannon, Former Attorney General, Massachusetts

Chesterfield Smith, Former President, American Bar Association

Alan C. Sundberg, Former Chief Justice, Florida Supreme Court

Leonard v.B. Sutton, Former Chief Justice, Colorado Supreme Court

Telford Taylor, Nash Professor of Law, Emeritus, Columbia Law School

Harold R. Tyler, Jr., Former Deputy Attorney General of the United States, Former Judge, United States District Court, Southern District of New York

ISSUE PRESENTED

Does the respondent's claim for relief in federal habeas corpus, namely that the state denied him an opportunity to be heard before the jury regarding factual issues the state had made dispositive, necessarily depend on a genuine change in the federal legal standards that were in place at the time his conviction became final?

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STATEMENT OF THE CASE

Under Illinois law, a criminal defendant cannot be convicted of murder even though the prosecution sustains its burden of proving the elements of that offense, and must instead be convicted of manslaughter, if the accused demonstrates that he or she acted under a sudden and intense passion produced by serious provocation. The respondent, Kevin Taylor, was charged with murder. His trial testimony tended to show that he should be acquitted on the murder charge and convicted of manslaughter--on the basis of provocation and passion. The trial judge concluded that Taylor's testimony warranted a jury instruction on manslaughter.

The judge initially instructed the jury that it should convict for murder if it concluded that the prosecution had proven the elements of that offense. Thereafter, the judge instructed the jury that it should convict for manslaughter if it concluded that

Taylor had acted under the necessary passion and provocation. The petitioner, Warden Gilmore, concedes that, recited in that order, those instructions may have given the jury the false impression that it could convict for murder if it found the prosecution's proof of murder sufficient, even though it also found Taylor's testimony sufficient to establish the passion and provocation prerequisites for manslaughter. Thus Gilmore concedes that the instructions "potentially removed an affirmative defense from the jury's consideration." Brief for Petitioner at 19-20.

The jury convicted Taylor of murder. In federal habeas corpus, he now contends that, having made passion and provocation determinative of a lesser level of culpability than is required for murder, the state may not withdraw those very issues from the trier of fact, via jury instructions. Taylor thus claims that the instructions read

to his jury denied him an opportunity to be heard, by the only decision-making authority that counted, on the only factual issues that counted.[1]

Gilmore contends that if this claim has merit, it is only because the applicable federal constitutional principles have changed since Taylor's conviction became final. Accordingly, Gilmore argues that the claim cannot be considered in federal habeas corpus under this Court's decision in Teague v. Lane, 489 U.S. 288 (1989), and its progeny. The lower court unanimously rejected Gilmore's argument in an opinion by Judge Flaum, joined by Judge Posner and Judge Manion. Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992).

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[1] The state aggravated this due process violation by making Taylor the instrument of his own downfall, i.e., by inviting him to take the stand and admit to key elements of the prosecution's case for murder in order to establish the prerequisites for manslaughter, a matter the jury was then effectively instructed to ignore.

STATEMENT OF INTEREST

This brief is filed on behalf of forty-five individuals. They include former Attorneys General of the United States and of several states, former state and federal trial and appellate judges, former Senators and Representatives, and former prosecutors. They include practicing attorneys, law school professors, and community leaders in other professions. They are men and women, Democrats and Republicans. Most importantly, they reflect an extraordinary depth and breadth of experience in every aspect of our criminal justice system. Their common interest and concern is that federal habeas review continue to be available to state prisoners who have been unconstitutionally convicted and sentenced.

In their briefs, the parties frame Taylor's precise claim for federal habeas corpus relief and the constitutional standard on which it depends, and then explore the

precedents in place at the time Taylor's conviction became final to determine whether that standard emerges from those precedents. This amicus curiae brief supplements the parties' treatment of the procedural due process principles and relevant case law by addressing the general "retroactivity" framework established by Teague v. Lane, supra, and subsequent decisions.

SUMMARY OF ARGUMENT

In Griffith v. Kentucky, 479 U.S. 314 (1987), and Teague v. Lane, supra, this Court embraced two central features of Justice Harlan's views on "retroactivity"--his view that shifts in federal constitutional law should not ordinarily be announced and applied in habeas corpus and his analysis of what counts as a genuine change in the law. Thus the Court's recent "retroactivity" decisions hold only that a federal court cannot award habeas relief on the basis of a principle of federal law for which the precedents in existence at the time the petitioner's sentence became final cannot fairly be said to stand. True to Justice Harlan's views, those decisions do not fundamentally alter the way the federal habeas courts have always assessed the novelty of legal standards.

The key issue in a retroactivity case is a temporal "choice of law" question. The

state endorses one legal standard and insists that the petitioner necessarily relies on a later-developing standard. In response, the petitioner contends that his claim rests on the legal standard in place when the state courts acted. The federal court is obliged, then, to "choose" the appropriate standard for adjudication in habeas corpus. Thus the court's task is to identify the proper legal standard and then to apply that standard to the petitioner's claim de novo.

Warden Gilmore persists in a deeply mistaken understanding of the meaning of new rules within the Court's current framework. He conflates a federal court's law-choosing function with its law-applying function. In Gilmore's view, a federal court creates "new" law whenever it applies a settled legal standard and reaches a conclusion different from the conclusion the state courts erroneously, but "reasonably," reached--when they applied the same legal standard to the

facts of the prisoner's case. If Teague meant that, it would amount to a deferential "standard of review" for appraising the work of the state courts. Yet as Justice O'Connor and Justice Kennedy have explained, Teague does not establish any such across-the-board rule of deference.

This Court's approach to the retroactive application of changes in the law does not conflict with the federal courts' statutory responsibility to apply settled law. Teague is not a flank attack on Brown v. Allen, 344 U.S. 443 (1953). By contrast, Teague presupposes Brown and, accordingly, the federal habeas courts' continuing authority and obligation to determine properly presented claims resting on settled federal law to the best of their ability.

Like other procedural barriers that prisoners must clear in order to put the merits of their claims before a federal habeas court, Teague's retroactivity doctrine

fixes a prerequisite to adjudication on the merits. If a claim can be sustained only by announcing and applying a new federal legal standard in support, the claim is not properly before a federal court in habeas corpus--except in special circumstances.

There is no single definition of "new rules" for all occasions.[2] As Justice Harlan warned, these matters are far too complex for that. If, indeed, the lower courts were to seize upon some simplistic formulation, they might reach equally simplistic results and thus fail to perform the function this Court's analysis alots to them: to deter state court violations of existing legal standards.

Clearly, genuine changes in the law occur when a settled legal standard that would lead to one result with respect to a

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[2] Compare Murray v. Carrier, 477 U.S. 478, 486 (1986)(noting there is no simple test for "cause" within the Court's framework for procedural default cases).

petitioner's claim is discarded in favor of a different legal standard that generates another outcome--when decisions overrule established precedents, explicitly or implicitly, or abandon longstanding and widely accepted practices. Just as clearly, courts do not ordinarily create new legal rules when they apply existing standards to different patterns of historical fact. If the routine application of settled law created entirely new rules, then, again, the Court's retroactivity analysis would be on a collision course with the Habeas Corpus Act.

The statement in Teague that a rule is new if it was not "dictated" by precedent at the time the state courts acted cannot be understood to mean that the only rules that are settled are those that are compelled as a pristine matter of deductive logic. Instead, the "dictated-by-precedent" line merely reflects the Court's purpose to protect the

states against federal habeas judgments based on genuine departures from the past.

The suggestion in Butler v. McKellar, 494 U.S. 407 (1990), that Arizona v. Roberson, 486 U.S. 675 (1988), advanced the law because the outcome in that case was previously "susceptible to debate among reasonable minds" is equally unservicable as an all-purpose test for new rules. The Court did not present the "reasonable-minds-might-differ" line as a universal standard, and if it were taken literally it could lead, once again, to the unacceptable conclusion that courts change substantive legal principles when they merely apply settled legal standards to particular cases. Justice O'Connor has explained that the state courts act reasonably within the meaning of Butler only when they adhere to established legal standards. And if a federal habeas court concludes that the facts in a petitioner's case are not distinguishable in a meaningful

and material way from the facts in the older cases that announced the legal standard on which he or she relies, the federal court can award relief without changing the law.

The initial step in a "new rule" case is to identify with as much precision as possible the petitioner's claim for federal relief and the abstract legal standard on which it rises or falls. That standard must be articulated at the proper level of generality. If it is stated either too generally or too specifically, the very purpose of the Court's retroactivity analysis will be frustrated.

Next, the federal court must determine whether the legal standard on which the prisoner relies finds support in the precedents in existence when the state courts acted. The standard for judging the content of then-prevailing law is objective. It is not dispositive that the authorities were in conflict or that, in other cases, courts or

individual judges have characterized legal rules as either well-settled or novel. At best, such characterizations are only evidence regarding the question of federal law to be decided by the federal habeas court--whether the precedents at the relevant time fairly can be said to stand for the proposition on which the prisoner now relies.

The claim that Kevin Taylor presents in this case rests on principles of procedural due process that were firmly settled long before his conviction became final and thus are fully applicable in federal habeas corpus. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. GRIFFITH v. KENTUCKY AND TEAGUE v. LANE EMBRACED BOTH JUSTICE HARLAN'S DISTINCTION BETWEEN CASES ARISING ON DIRECT REVIEW AND CASES ARISING IN HABEAS CORPUS AND HIS EXPLANATION OF WHAT COUNTS AS A NEW RULE FOR "RETROACTIVITY" PURPOSES.

In Griffith v. Kentucky, 479 U.S. 314 (1987), and Teague v. Lane, supra, this Court embraced the principal features of Justice Harlan's approach to deciding whether (and when) changes in the federal legal standards governing criminal cases should be applied "retroactively." First, changes in the law must always be applied on direct review, but should be applied in habeas corpus only in special circumstances. Mackey v. United States, 401 U.S. 667, 675 (1971) (separate opinion). Second, the recognition of a new rule of constitutional law is a "complex" matter, requiring the federal habeas courts to "chart out the proper implications of the governing precedents at the time of a petitioner's conviction." Desist v. United

States, 394 U.S. 244, 263, 268 (1969) (dissenting opinion).

The adoption of Justice Harlan's sharp distinction between direct review and habeas corpus is a significant departure from the Court's previous approach to retroactivity. In Linkletter v. Walker, 381 U.S. 618 (1965), the Court assumed that the Constitution did not speak to whether a change in the law should be applied to cases already final. Irrespective of whether a case arose on direct review or in habeas, the Court decided whether a new rule could be applied to it by weighing the values that would be served by retrospective application against state reliance interests. Stovall v. Denno, 388 U.S. 293 (1967).

Now, the retroactivity question has been reconceptualized along the lines proposed by Justice Harlan. According to Griffith, the Constitution does govern cases arising on direct review and, in that context, requires

that new rules be applied both to the case at bar and to all other cases still subject to direct review.[3] According to Teague, cases arising in habeas corpus are controlled by the Habeas Corpus Act, which is construed to deny federal habeas relief on the basis of new rules, except in extraordinary cases.[4]

By contrast, the acceptance of Justice Harlan's approach to the identification of changes in the law marks no similar departure from the past. Even under the Linkletter approach, it was necessary to decide whether

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[3] In Mackey v. United States, supra at 681, Justice Harlan said that "a proper perception of [this Court's] duties... mandates that we apply the law as it is at the time, not as it once was." In Griffith v. Kentucky, supra at 322, the Court said that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."

[4] In Mackey v. United States, supra at 684, Justice Harlan said that "whether...new rules...should be applied 'retroactively'... must be considered...a problem as to the scope of the habeas writ." In Teague v. Lane, supra at 308, the Court adopted "Justice Harlan's description of the function of habeas corpus."

a rule was new in order to trigger the further inquiry whether, if it was, it should be applied retrospectively. When Justice Harlan dissented from the Court's decisions under the Linkletter regime, it was not because he concluded that the law had changed when the majority thought otherwise, but rather because the full Court refused to distinguish direct review and habeas cases as he insisted it should.

In Teague, even as the Court abandoned Linkletter's standards for determining the retroactive effect of new rules, the Court referred to Linkletter and other cases in the Linkletter line as examples of "new rule" determinations.[5] Accordingly, when the

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[5] The Court mentioned, for example, Johnson v. New Jersey, 384 U.S. 719 (1966), in which the Court held that the new rule announced in Miranda v. Arizona, 384 U.S. 436 (1966), would be applied only prospectively, and Desist v. United States, supra, in which the Court decided that the new rule established by Katz v. United States, 389 U.S. 347 (1967), would also be applied only to future cases.

federal habeas courts decide whether a rule is new for purposes of Griffith/Teague, they do nothing that they have not already been doing for nearly thirty years. The only difference is that the "new rule" question now arises only in the habeas context.

The Griffith/Teague framework thus does not import "new rule" issues into habeas cases where they would not have figured before. Nor does Griffith/Teague invite the states to make "new rule" arguments in ordinary habeas cases. In "ordinary" cases, "no question of retroactivity arises"--for the straightforward reason that courts, federal habeas courts included, "are as a general matter in the business of applying settled principles...of law to the disputes that come to bar." James B. Beam Distilling

Co. v. Georgia, 111 S.Ct. 2439, 2442 (1991).[6]

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[6] The abandonment of the Linkletter framework has put greater pressure on the proper understanding of when new rules are created. Under Linkletter and Stovall v. Denno, supra, state reliance interests with respect to prior law were addressed both indirectly and directly: indirectly when new rules were identified (largely on the ground that they marked a "clear break" from precedent), and directly when the retroactive effect of new rules was determined (largely by assessing the disturbance that retroactive application would entail). The Court's new framework retains only the first, indirect means of protecting state reliance interests. States' attorneys attempting to preserve state judgments can no longer argue simply and forthrightly that it would be disruptive to apply current legal standards to cases already final, but must funnel all their efforts into persuading courts that current law is different from what it once was. Bluntly put, states' attorneys may attempt to inflate the scope of what constitutes a "new rule" in order to defeat prisoners' claims. Justice Harlan understood this point and, accordingly, cautioned that his approach would require a careful analysis of the content of legal rules, lest these pressures lead courts to confuse the making of genuine changes in the law with the application of settled standards to analogous cases. Mackey v. United States, supra at 695 (separate opinion).

II. THE IDENTIFICATION OF NEW RULES PRESENTS A CHOICE-OF-LAW ISSUE TO THE FEDERAL HABEAS CORPUS COURTS AND DOES NOT AMOUNT TO A DEFERENTIAL STANDARD FOR REVIEWING STATE COURT JUDGMENTS.

The question whether a legal standard is new for retroactivity purposes presents a "choice of law problem." Mackey v. United States, supra at 682 (separate opinion by Harlan, J.). Justice Souter has explained why this is so:

> It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law....James B. Beam Distilling Co. v. Georgia, supra at 2443.[7]

[7] The Court has said that its approach to retroactivity in civil cases like James Beam may not track its approach in Griffith/Teague. Griffith v. Kentucky, supra at 322 n.8. Yet on this foundational level, there is and can be no difference between civil and criminal cases.

In habeas corpus cases after Teague, a federal district court must follow a two-stage analysis. Initially, the court must choose the applicable rule of law--by identifying "the rule on which the claim for habeas relief depends," Wright v. West, supra at 2501 (Souter, J., concurring), and ensuring that that rule prevailed at the time the petitioner's conviction became final. Then, the court must apply that same rule of law to the facts of the instant case.

This point has eluded Warden Gilmore, who misconceives Teague and subsequent cases to require the federal courts to defer to previous state judgments even if they were wrong, so long as they were not unreasonably wrong.[8] The test for new rules under the Griffith/Teague framework does not establish

[8] Brief for Petitioner at 22 (contending that the state courts no longer must reach "correct" decisions on federal constitutional claims, but rather are responsible only for "reasonable" judgments). Accord, Brief for Petitioner in Wright v. West, supra.

any such deferential "standard of review." Wright v. West, supra at 2497 (O'Connor, J., concurring). The federal courts do not deem previous state judgments regarding legal or mixed questions to be correct on the theory that those courts are in a better position than the federal courts to decide such matters. Id. at 2499 (Kennedy, J., concurring). In habeas corpus, indeed, a federal court does not "review" a prior state decision at all, but rather determines "whether the petitioner is 'in custody in violation of [federal law].'" Coleman v. Thompson, 111 S.Ct. 2546, 2554 (1991).

At least since Brown v. Allen, 344 U.S. 443 (1953), this Court has construed the Habeas Corpus Act to command the federal courts to exercise de novo judgment regarding the legal and mixed issues presented by properly preserved claims. E.g., Miller v. Fenton, 474 U.S. 104 (1985). Congress has adopted that interpretation--explicitly by

codifying Brown, and implicitly by rejecting bills that would have undercut Brown.[9]

Habeas corpus differs from direct review in that the procedural requirements petitioners must meet are different. And under Griffith/Teague, the legal standards that the federal habeas courts can consider may be different: changes in the law usually

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[9] In 1966, Congress adopted amendments to the Act, which: (1)added what is now §2254(a), explicitly codifying the federal courts' authority to receive petitions from state convicts; (2)specified in §2254(d) that the federal courts are to presume state findings of primary fact to be true in many circumstances, underscoring that state determinations of legal and mixed questions are not entitled to similar deference; and (3)established more stringent rules for multiple federal petitions from a single petitioner, again underscoring that a federal court is not constrained to accept a previous state judgment when a prisoner files an initial federal petition. For a fuller exploration of the implications of the 1966 amendments and their legislative history, see the briefs filed by amici in support of the respondent in Wright v. West, supra. Congress has repeatedly rejected legislative bills that would have required the federal courts to defer to previous state conclusions with respect to legal and mixed questions. Wright v. West, supra at 2498 (O'Connor, J., concurring).

cannot be applied. But when prisoners meet the procedural requirements for putting claims before the federal courts in habeas, and when those claims do not depend on changes in the law, the federal habeas courts have the same adjudicatory function that this Court has on direct review. Wright v. West, supra at 2497 (O'Connor, J., concurring) (explaining that the federal habeas courts have an obligation to "say what the law is"). In both instances, previous state judgments regarding legal and mixed questions are considered for the persuasive value they may have--but "without any hint of deference to the state courts." Id. at 2495.[10]

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[10] Put another way, a federal habeas court must give a petitioner's claim the same merits consideration it would have received in this Court on direct review of the state conviction. The legal standard this Court would have applied at that time is, by definition, the legal standard that prevailed when the prisoner's conviction and sentence became final.

The very purpose of the Court's new approach to retroactivity is to ensure that a prisoner's custody is based on a "correct application" of previously settled legal standards. Teague v. Lane, supra at 306-07, quoting Solem v. Stumes, 465 U.S. 638, 653 (1984)(Powell, J., concurring); Wright v. West, supra at 2499 (Kennedy, J., concurring) (explaining that the idea is to avoid upsetting a state judgment grounded in a "rule" that was "thought [to be] correct" at the time)(emphasis supplied)."[11] That purpose would be thwarted if the federal

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[11] The states' legitimate reliance interests extend only to the finality of correct judgments on federal claims. If, then, a federal court, applying a settled legal standard, concludes that the state courts reached a conclusion that was erroneous at the time, the federal court is duty-bound to award relief. State authorities may well have to expend resources to cure constitutional error identified in federal court, but interests in avoiding that kind of expense cannot justify withholding federal relief from a prisoner entitled to it. The federal courts' jurisdiction in habeas would otherwise be unintelligible.

courts were to defer to state judgments said to be minimally rational. Id. at 2497 (O'Connor, J., concurring)(noting that "a state court's incorrect legal determination" has never "been allowed to stand because it was reasonable").[12]

The current framework for retroactivity thus does nothing to the bedrock principle that a federal habeas corpus court must independently apply the applicable legal standard to facts of an individual case. Teague only instructs the court on what the applicable legal standard is. Nothing in that case suggests that, in applying a correct legal standard, a federal court is to

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[12] It would be circular, of course, to suggest that if a state judgment was "reasonable," it can be considered to have been correct. Thus this Court routinely determines the correct disposition of federal claims arising in habeas corpus, so long as those claims do not depend on a change in the legal standard that prevailed when the state courts acted. Richmond v. Lewis, 61 U.S.L.W. 4013 (Dec. 1, 1992); Estelle v. McGuire, 112 S.Ct. 475 (1991); Lewis v. Jeffers, 110 S.Ct. 3092 (1990).

suspend its own judgment in favor of a previous decision in state court. If a federal court were to do that, it would relinquish its very function under the Court's current framework: deterring state violations of federal constitutional rights.[13]

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[13] The Habeas Corpus Act incorporates the idea behind a "standard of review" only in that §2254(d) recognizes that the state courts may be in a position to determine primary, historical facts and thus directs the federal courts to defer to their findings in many circumstances. Wright v. West, supra at 2499 (Kennedy, J., concurring). With respect to legal and mixed questions, by contrast, the Act charges the federal courts to exercise independent judgment (invoking legal principles fairly supported by precedents previously in existence)--not to "review" state judgments (applying the same principles) on any deferential standard. It is because of the federal courts' duty to exercise de novo judgment in habeas that their different function in administrative law cases, in which they do review prior judgments on a deferential standard, is readily distinguishable. When a federal court reviews an agency's interpretation of an ambiguous federal statute, it has an entirely different assignment--pursuant to other statutes and precedents, which allocate authority between courts and administrative authorities in light of the expertise and political accountability of the latter. See Chevron U.S.A. v. Nat'l

III. TEAGUE AND ITS PROGENY ESTABLISH A PRECONDITION TO ADJUDICATION ON THE MERITS AND DO NOT ABRIDGE THE FEDERAL COURTS' AUTHORITY AND RESPONSIBILITY TO DETERMINE PROPERLY PRESENTED CLAIMS.

This Court's constructions of the Habeas Corpus Act sometimes recognize procedural barriers that prisoners must surmount in order to obtain an adjudication on the merits. In McCleskey v. Zant, 111 S.Ct. 1454 (1991), for example, the Court elaborated on the rules that discourage abusive successive petitions from a single prisoner. And in Wainwright v. Sykes, 433 U.S. 72 (1977), Coleman v. Thompson, supra, and other cases, the Court has established rules governing the effect to be given procedural default in state court.

Procedural rules of this kind ensure relatively smooth and efficient adjudication,

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Res. Defense Council, 467 U.S. 837 (1984). No such considerations inform the statutory scheme fixing the federal courts' function in habeas corpus.

with appropriate attention to the interests of the states. They do not abridge the substantive subject matter jurisdiction that Congress has conferred and this Court is bound to respect. If a petitioner successfully negotiates the procedural barriers that McCleskey and Coleman establish and thus presents a claim "in a proper procedural manner," there is no question that the federal court has the duty to adjudicate "all dispositive constitutional claims." McCleskey v. Zant, supra at 1462, citing Brown v. Allen, supra, and Wainwright v. Sykes, supra at 79. For it would be senseless to devise interstitial procedural rules that thwart the very jurisdiction they are meant to facilitate.

Likewise, the Court's construction of the Habeas Corpus Act in Teague addresses a threshold prerequisite for adjudication on the merits. Teague deals with the initial stage of retroactivity analysis (when the

federal court identifies the legal standard to be applied in habeas corpus) and does nothing to undercut the federal courts' function at the second stage (when the federal court applies that legal standard to the facts of the instant case). Claims that can be successful only if the federal courts announce and apply a genuine change in the law, like claims that are procedurally barred, are simply not properly before a federal habeas court for decision. Claims that rest on settled law, by contrast, are plainly cognizable under the jurisdiction that Congress has conferred.[14]

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[14] The Court has said that when the state contends that a claim is Teague-barred, the federal court must determine whether that is so and, if it is, whether the new rule applies retroactively, before passing on the merits in light of the appropriate legal standard for habeas adjudication. In this way, too, the Court has conceptualized Teague as a "threshold question" in habeas corpus. See Wright v. West, supra at 2500 (Souter, J., concurring).

Justice O'Connor made this point in Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992) (O'Connor, J., dissenting)(joined by Blackmun, Stevens & Kennedy, J.J.), when she listed Teague along with McCleskey and Coleman as "hurdles" that petitioners must clear before a federal court can take up the merits of their claims:

> But once [McCleskey, Coleman, Teague, and other hurdles] have been surmounted--once the claim is properly before the district court--a habeas petitioner, like any civil litigant, has...a right to a hearing where one is necessary to prove the facts supporting his claim. Keeney v. Tamayo-Reyes, supra at 1722 (dissenting opinion).[15]

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[15] The issue that divided the Court in Tamayo-Reyes was the appropriate standard to be applied when a prisoner's counsel in state court negligently failed to develop the facts supporting a claim, and the prisoner seeks a federal evidentiary hearing to complete the record. Justice White's majority opinion concluded that defaults with respect to the development of underlying facts should be treated in the same way as defaults with respect to legal claims themselves and thus held that, in either instance, prisoners must meet the Court's modern "cause-and-prejudice" tests. Justice O'Connor would have retained a waiver rule for defaults with respect to the development of facts. The focus in Tamayo-

Writing separately in Tamayo-Reyes, Justice Kennedy underscored that Teague, like McCleskey and Coleman, merely screens habeas petitions to isolate questions for fresh, independent adjudication on the merits:

> Our decisions in [Coleman, McCleskey, and Teague ensure] that the legal questions presented are ones which, if resolved against the State, can invalidate a final judgment. So we consider today only those habeas actions which present questions federal courts are bound to decide in order to protect constitutional rights. Id. at 1727-28 (emphasis supplied).[16]

Reyes on federal evidentiary hearings explains why the quotation in the text goes explicitly to that point, rather than to the more fundamental point that it assumes--namely that when claims are properly before the federal courts, those courts exercise independent judgment on the merits, with or without an evidentiary hearing.

[16] Indeed, all the opinions in Tamayo-Reyes are consistent with the understanding that Teague and its progeny leave intact the federal habeas courts' independent judgment regarding properly presented legal claims. Justice O'Connor grounded her dissent on the distinction between rules governing when a claim is properly before a federal court (where forfeiture rules like the "cause-and-prejudice" tests are appropriate) and rules going to the way in which a federal court adjudicates the merits (where, in her view,

IV. THERE IS NO TALISMANIC DEFINITION OF NEW RULES THAT GENERATES READY ANSWERS IN ALL CASES, BUT SOME GUIDELINES HAVE EMERGED TO INFORM THE FEDERAL COURTS' REASONED JUDGMENT.

When Justice O'Connor inaugurated the new approach to retroactivity in Teague, she said that "it is admittedly often difficult to determine when a case announces a new rule." Teague v. Lane, supra at 301. In this, she followed Justice Harlan, who also cautioned that the theory that the federal

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forfeiture rules are inappropriate). She, of course, put the rule implicated in Tamayo-Reyes (governing the development of primary facts) in the latter category.

Writing for the Court, Justice White did not reject the baseline distinction between door-keeping rules and rules touching the adjudication of properly presented claims. Nor did he deny that McCleskey, Coleman, and Teague are properly understood to establish "precondition[s] to reaching the merits...." Id. at 1719 n.3 (majority opinion). He differed with Justice O'Connor only in that, in his view, default rules with respect to the development of the factual record should be placed in the same category with procedural bar rules--and not (where Justice O'Connor would put them) in the (forbidden) category of rules that undermine the federal courts' statutory jurisdiction to determine properly presented claims independently.

habeas courts should not apply changes in the law was "complex." Desist v. United States, supra at 263 (dissenting opinion). In particular, Justice Harlan recognized the complexity of identifying when it is that a new rule has actually been created. In all prudence, then, Justice O'Connor made no attempt in Teague to "define the spectrum" of what may constitute a new rule. Teague v. Lane, supra at 301.[17] Nor have subsequent decisions tried to do that comprehensively.

The danger, of course, is that any attempt to capture new rules in a single definition for all seasons runs the enormous risk that other courts and lawyers might mistake such a definition for a mechanical device that neatly grinds out unimpeachable results in actual cases. Yet "new rule"

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[17] Of course, Justice O'Connor had no occasion in Teague to press these matters far. The legal rule for which the prisoner contended in that case would have been "new" under any plausible test.

cases by their nature defy any such simple resolutions. The establishment of a rigid formula for identifying new rules would frustrate the very principle on which Griffith/Teague proceeds, namely that "a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction." Desist v. United States, supra at 268 (Harlan, J., dissenting).[18] For this reason, the Court should continue on the course charted in recent cases, identifying guidelines that can inform the judgments that must be made.

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[18] Another amicus vividly illustrates this point. Teague hopes to foster state court obedience to prevailing federal constitutional law. Yet in the futile pursuit of a mechanical, "bright line" test for new rules, the Criminal Justice Legal Foundation proposes that Teague should bar federal consideration of any claim resting on a legal standard that departs from an "established state practice." Brief of the Criminal Justice Legal Foundation at 3. That test for new rules would pick out the very worst of the evil that Teague is meant to redress (repeated state court failures to respect federal law) and perversely shield that evil from federal evaluation.

The Court clearly has found legal standards to be new when they constitute "clear breaks" from the past. By contrast, the Court has consistently explained that the application of legal standards to different fact patterns rarely creates new rules--even though, in a system that depends on stare decisis for both stability and flexibility, a build-up of analogous precedents may reflect an incremental evolution in the law.

A. A genuine change in the law is typically made by discarding an established legal standard under which a claim would have failed and substituting a different legal standard under which the claim succeeds.

By all accounts, courts "make" new law when they jettison an established legal standard that, if controlling, would generate one result regarding a prisoner's claim, in favor of a competing standard that produces a different result. James B. Beam Distrilling Co. v. Georgia, supra at 2443. Accord Desist v. United States, supra at 248.

New rules are established under this heading when courts overrule precedents, disregard prior authority sub silentio, or "overturn[] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." United States v. Johnson, 457 U.S. 537, 551 (1982).[19] The classic illustrations are Mapp v. Ohio, 367 U.S. 643 (1961); Gideon v. Wainwright, 372 U.S. 335 (1963), and Miranda v. Arizona, 384 U.S. 436 (1966)--all of which

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[19] This point accepted, Justice Harlan cautioned that there nonetheless may be instances in which legal standards, albeit still supported by precedent, have been so seriously undermined that professionals can have no confidence in their vitality. A federal habeas court does not establish a new rule by acknowledging that such a legal standard had ceased to be an accurate reflection of federal law when a prisoner's case was in state court and, accordingly, invoking the correct legal standard prevailing at that time to dispose of the prisoner's claim in federal habeas corpus. Desist v. United States, supra at 265 (dissenting opinion).

displaced prior law and thus established new rules for retroactivity purposes.[20]

B. A genuine change in the law is not typically made by applying a settled legal standard to a different pattern of facts.

The application of a legal standard established in one case to the different pattern of primary facts in another case does not ordinarily create a new rule:

> [W]hen a decision...has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases,...the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. United States v. Johnson, supra at 549 (emphasis supplied).

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[20] Cases like Mapp, Gideon, and Miranda exemplify Justice O'Connor's generalization that a decision "announces a new rule when it breaks new ground or imposes a new obligation on the States...." Teague v. Lane, supra at 301. Decisions that are not such obvious "clear break" cases as express overrulings are treated in the same way if they genuinely change the controlling legal standard. Solem v. Stumes, supra.

The content of the law can be found in what judges do, as well as in what they say. Yet that realist insight does not and cannot obliterate the difference between law and its application in concrete cases. Abstract standards are real; they give structure and content to law and make it more than a ceaseless flow of decisions resolving isolated disputes ad hoc. Obviously, this Court has not held that, in any case in which a prisoner cannot "point to an old case decided on facts identical to the facts of his own," a federal district court can find the prisoner's claim meritorious only by changing the law. Wright v. West, supra at 2502 (Souter, J., concurring).[21]

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[21] Justice Harlan, too, noted that a court does not announce a new rule simply by applying a "well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." Desist v. United States, supra at 263 (dissenting opinion).

Moreover, reading new rules of law into cases in which unchanged legal standards are applied would, once again, merge the two independent stages of retroactivity analysis and put Teague on a "collision course" with the very substance of the habeas corpus jurisdiction conferred by Congress. Wright v. West, supra at 2498 (Kennedy, J., concurring), citing Miller v. Fenton, supra. As Justice Frankfurter wrote in Brown:

> [S]o-called mixed questions or the application of constitutional principles to the facts...leave the duty of adjudication with the federal judge....[A] prior State determination of a claim...cannot foreclose consideration of such a claim [in federal habeas corpus], else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have. Brown v. Allen, supra at 507-08, 500 (separate opinion for a majority) (emphasis supplied).

1. The statement in Teague that a rule is new if it was not dictated by precedent at the time a case was in state court does not collapse the choice-of-law inquiry into a search for a precedent that logically compelled the state courts to find a petitioner's claim meritorious.

While Teague eschewed any single definition of new rules, the Court did say that, in "general," the federal courts should conclude that they must change the law in order to hold for a prisoner if the legal standard on which he or she depends was not "dictated" by precedent at the time the state courts acted. Teague v. Lane, supra at 301 (emphasis in original). Obviously, the Court did not have in mind precedents that compel results in later cases by irrefutable logic. Constitutional law may be many things, but it is not mathematics. Individual cases rarely are preceded by decisions "on all fours" with the facts. Lawyers typically argue by analogy from previous cases with similar fact patterns. Yet this Court has not, on that

account, sent the federal habeas courts off chasing precedents that precisely map the primary facts of the case at bar. Any such fact-centered understanding of new rules would fail once again to appreciate that the "new rule" problem is a matter of selecting the correct legal standard for federal adjudication of a prisoner's claim.[22]

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[22] Justice Scalia's dissent in Penry v. Lynaugh, 492 U.S. 302 (1989), is not to the contrary. Unlike the majority, Justice Scalia thought the relevant precedents in that case were sufficiently unclear to justify a holding that the Court had made new law via clarification. In service of his argument, he did use terms like "compelled" and "compulsion." Yet he scarcely suggested that the content of a legal standard is so inextricably linked to each and all of the facts in the case in which it is announced that it cannot be applied to another case whose facts differ in some way without the creation of an entirely new rule of law. On the contrary, Justice Scalia recognized that in a system "based on precedent and stare decisis," abstract legal standards must be distinguished from the primary facts in concrete cases. He simply disagreed with the majority regarding the content of the legal standard "in the present case." Id. at 353. In Saffle v. Parks, 494 U.S. 484, 488 (1990), the Court said that the question was "whether a state court...would have felt compelled by existing precedent" to find the prisoner's

In Teague itself, Justice O'Connor offered the "dictated-by-precedent" only as a way to "put...differently" the basic point that a new rule "breaks new ground." Teague v. Lane, supra at 301.[23] More recently, she

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claim meritorious. That line followed a recitation of other guiding principles, however, and thus cannot be read to abandon everything else the Court has said about new rules and to transmute the "new rule" inquiry to a formalistic exercise in deductive logic. The Court went on in Parks to explain that the prisoner's claim necessarily depended on a legal standard for which precedents at the critical time did not stand.

[23] The "dictated-by-precedent" phraseology was original with Teague. Yet the Court cited generally to Justice Powell's dissent in Truesdale v. Aiken, 480 U.S. 527 (1987). Justice Powell read the per curiam in Truesdale to be based on the assumption that Skipper v. South Carolina, 476 U.S. 1 (1986), had "applied the settled principles" in Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), to a "new fact situtation." Truesdale v. Aiken, supra at 528. Justice Powell expressed no disagreement with the proposition that, if Skipper had merely applied settled principles to "new" facts, it followed that Skipper had not changed the law for retroactivity purposes. He simply disagreed that Skipper was based on the earlier cases. By Justice Powell's contrary account, Skipper announced a new rule of law, because it "broke new ground." Truesdale v. Aiken, supra at 529.

has made it clear that she intended no departure from Justices Frankfurter and Harlan regarding the federal courts' authority to apply settled standards to analogous cases. Wright v. West, supra at 2497 (O'Connor, J., concurring). Thus the "dictated-by-precedent" line merely reflects Teague's purpose to avoid subjecting the states to a regime in which their judgments are upset by "changing" a rule of law "once thought correct but now understood to be deficient on its own terms." Id. at 2499 (Kennedy, J., concurring).

Thus the single authority the Court cited in Teague to explain the "dictated-by-precedent" formulation was an opinion by Justice Powell that both accepted the understanding that the application of a legal standard to "new" facts does not create new law, and endorsed the understanding that the best test of whether a legal standard is new is whether it clearly breaks with prior law.

2. The statement in Butler v. McKellar that reasonable minds might have differed regarding the proper outcome of that case at the time the state courts acted cannot be read to mean that a federal court must defer to a previous state judgment so long as it was "reasonable" in light of then-existing legal standards.

In the course of deciding whether Arizona v. Roberson, supra, had changed the law, this Court said in Butler v. McKellar, supra at 415, that the "outcome in Roberson was [previously] susceptible to debate among reasonable minds."[24] That line in Butler is equally unavailing as a neat and simple definition of new rules. The Court did not offer it as a test for new rules at all. If

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[24] The petitioner in Butler contended that his claim under Edwards v. Arizona, 451 U.S. 477 (1981), rested on the legal standard in Edwards itself and, accordingly, that he could be awarded relief in habeas corpus without the invocation of a new rule of law. This Court held, however, that a key circumstance in Edwards was not reproduced in the Butler petitioner's case and, therefore, that the prisoner in Butler could only succeed if he were given the benefits of Roberson, supra. The Court used the "reasonable-minds-might-differ" line by way of explaining that Roberson had been an advancement from Edwards.

it were taken for such a test, it would lead to senseless results.

It would be untenable to propose that new rules can be understood in such a fact-directed manner. The federal habeas courts must focus on the abstract legal standard that prevailed when the prisoner was before the state courts. Only in that way can the federal courts treat habeas cases uniformly, applying the same (settled) legal standard to all comers. If a new rule of law were generated each time a federal court applied a settled legal standard to a different pattern of primary facts, the system would be rife with inconsistency. Modest differences in factual circumstances, judged by different federal courts, would produce inconsistent results. Plainly, then, new rules for retroactivity purposes must be new rules rather than new applications of old rules.

Accord Wright v. West, supra at 2497 (O'Connor, J., concurring).[25]

Moreover, whenever a case receives sufficient attention to produce a published

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[25] A petioner may ask a federal court to apply a settled legal rule in factual circumstances that differ so materially from the circumstances in which (and for which) the rule was established that an award of relief to the petitioner could not fairly be said to be grounded in the original rule at all, but, instead, would have to rest on a departure from that rule. This Court recognized as much in Stringer v. Black, 112 S.Ct. 1130, 1135 (1992), when it explained that Teague bears on the application of law to fact when a prisoner seeks the application of a settled rule in a "novel setting." In most instances, the question whether a prisoner's claim depends on a change in the law can be answered by identifying the legal standard on which he or she relies and comparing that standard to the standard that prevailed when the case was in state court. In some cases, however, it is necessary to examine the legally significant facts of the case at bar and relevant precedents. This is what Stringer makes clear. Of course, this second leg of Stringer's analysis only poses the same question at a different level. Irrespective of whether a "new rule" issue can be approached in the usual way by examining only the content of an abstract legal standard, or demands a more fact-sensitive inquiry, no case presents a genuine retroactivity problem in the absence of an objective change in substantive law.

opinion (and thus a precedent for other cases), it is probably because there are "reasonable" arguments on both sides regarding the application of a legal standard to the facts and, accordingly, the proper "outcome." If the mere existence of such differences of opinion regarding the correct outcome regarding a petitioner's claim when the parties were in state court made it necessary for a federal court to create new law in order to arrive at a different result, then every case would be a "new rule" case. That cannot be the law. The federal courts do not change legal standards whenever they differ with the state courts in the results they reach. Butler does not equate ordinary federal adjudication with the creation of entirely new legal standards--cynically forbidding the federal habeas courts to perform the very adjudicatory function that Congress has assigned to them.

As Justice O'Connor has explained, Butler does not require a federal habeas court to defer to a previous state judgment within "reasonable" bounds. Instead, a federal court must independently decide whether the legal standard on which a prisoner rests his or her claim for federal relief is "meaningfully distinguishable" from the standard that prevailed when the state courts acted. And if "a proffered factual distinction" between the prisoner's case and pre-existing precedents fails to "change the force with which [the principle underlying those precedents] applies," then any "deviation" from that principle by the state courts was "not reasonable" within the meaning of Butler. Wright v. West, supra at 2497 (O'Connor, J., concurring).

On the very day that Butler was decided, Justice Kennedy analyzed the "new rule" issue in Saffle v. Parks, supra, as precisely the choice-of-law question it was. The prisoner

in Parks argued that his claim was grounded in settled legal standards. Justice Kennedy refuted that contention not by speculating about whether "reasonable" minds might have thought otherwise, but by carefully exploring the content of the legal principles reflected in the relevant precedents and concluding that they would not support the petitioner's current claim.

More recently, in Stringer v. Black, supra, Justice Kennedy again made it clear that a petitioner's ability to claim habeas relief under a legal standard depends on whether that standard can be traced to the precedents that prevailed when the case was in state court. Referring expressly to Butler, Justice Kennedy explained that the federal court's inquiry demands more than conjecture about what it might have been "reasonable" to think at that time; it demands an "objective reading of the relevant cases." Id. at 1140.

Given the way in which the "reasonable-minds-might-differ" line was delivered in Butler, and the way in which this Court has examined "new rule" questions since, it is untenable to read that line as the radical revisionism that Warden Gilmore assumes it to be.[26] This Court's retroactivity doctrine simply does not eviscerate the federal courts' statutory jurisdiction to enforce settled legal standards in habeas corpus.[27]

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[26] Brief for Petitioner at 22.

[27] In the 102d Congress, the House of Representatives approved a bill that would have added the following section to the Habeas Corpus Act:

> In an action filed under this chapter, the court shall not apply a new rule. For purposes of this section, the term "new rule" means a clear break from precedent, announced by the Supreme Court of the United States, that could not reasonably have been anticipated at the time the claimant's sentence became final in State court. H.R. 3371, tit. XI, §1104, 102d Cong., 1st Sess. (1991).

An accompanying report explained that this provision was meant to "reject[]" the definition of a "new rule" suggested in Butler--that a rule is "new" if, "at the time

C. The federal court must identify the legal standard on which the petitioner relies (at the appropriate level of generality) and decide (objectively) whether the precedents previously in place can fairly be said to support it.

When the state contends that a claim is Teague-barred, a federal court must first identify "the rule on which the [petitioner's current] claim for habeas relief depends," stated at the proper level of generality. Wright v. West, supra at 2501 (Souter, J., concurring); accord id. at 2497 (O'Connor, J., concurring).[28] Since, at this first

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the State courts considered a petitioner's claim, the claim was susceptible to debate among reasonable minds." H.R. Rep. No. 102-242, 102d Cong., 1st Sess. 130 (1991); see H.R. 101-681, 101st Cong., 2d Sess. 122-28 (1990). A majority of the Senate voted to conclude debate on the bill, but a filibuster and a veto threat from President Bush prevented final action. For the House votes on H.R. 3371, see 137 Cong. Rec. H8005 (Oct. 17, 1991); 137 Cong. Rec. H11756 (Nov. 26, 1991). For the last cloture vote in the Senate, see 138 Cong. Rec. S6226 (Oct. 2, 1992).

[28] The legal standard on which the petitioner depends is not, of course, coextensive with the precedents cited in

stage of retroactivity analysis, the federal court is charged to identify the applicable rule of law for federal habeas adjudication, it follows that such an abstract rule must be articulable at a level of generality greater than the facts of any case. Accordingly, the focus at this threshold stage is on a precise articulation of the legal standard on which a prisoner's claim actually rises or falls, abstracted from any precedents said to support it.[29]

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brief. Much of the confusion below in this case, and in other cases like it, arises from undue focus on recent precedents and the dates on which they were established. When prisoners refer to decisions rendered since they were in state court, it may be assumed too quickly that their legal claims necessarily rest on recent case law and thus cannot be considered.

[29] In this case, for example, Warden Gilmore's characterizations of People v. Reddick, 123 Ill.2d 184, 526 N.E.2d 141 (1988), and Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), only distract attention from the real question: whether the legal standard on which Kevin Taylor's current federal claim depends was in place when his conviction became final.

If the rule on which a prisoner rests is articulated too generally, e.g., a denial of fair process, then no case would call for the announcement of a new rule. That, of course, would thwart Teague's purpose to avoid upsetting state court judgments on the basis of genuine changes in the law. If the legal standard is stated in extremely narrow, fact-specific terms, then every case would seem to be a "new rule" case. That, too, would frustrate the two-stage analysis of retroactivity cases. For again, the primary facts of one case are never completely reproduced in another. If minor factual variations between cases seemingly governed by the same legal standard were regarded as variations of the standard itself, and each such variation were taken to be a genuine change in the law, then the sum total of "new rule" cases would fill up the universe of the possible cases that can reach the federal

courts in habeas.[30] The task is to get the level of generality right. To do that, a federal habeas court cannot simply accept the characterizations given by the prisoner or state's attorneys, but must make a reasoned judgment that is sensitive to the subtle jurisprudential issue at hand.[31]

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[30] In this respect, it is well to keep in mind Justice Fortas' warning that if state courts doubt the wisdom of the course this Court charts in constitutional law, they may be inclined to "disregard the plain purport of [this Court's] decisions and adopt a 'let's-wait-until-it's-decided' approach." Desist v. United States, supra at 277 (dissenting opinion). If the state courts are to be encouraged to "toe" the line drawn by settled law, there will be occasions when they can fairly be held to "anticipate" the clear direction in which the law is incrementally moving. Cf. Solem v. Stumes, supra at 647 (opinion of White, J.)(asking whether state authorities could have been expected to "anticipate" the development of a legal standard).

[31] Obviously, the task is not to identify a prisoner's legal standard at a fact-specific level after the fashion of Justice Scalia's contention that courts relying on "tradition" to fill in the content of liberty within the meaning of the due process clause should look no further than historical practices defined at the most "specific" level available. Michael H. v. Gerald D., 491 U.S. 110, 127-28

Next, the court must determine whether the legal standard on which the petitioner relies can fairly be said to have prevailed when the state courts acted. This task demands an "independent evaluation" of the precedents at that time. Wright v. West, supra at 2497 (O'Connor, J., concurring). Much "time and effort" may be spent "scrutinizing" the relevant body of "federal law." Id. Only if the legal standards

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n.6 (1989). The point of that line of argument is to restrict the ability of life-tenured judges to defeat majoritarian policies by reference to traditions described in terms so expansive that they do not seriously check judges' own value judgments. Here, of course, the federal habeas courts are not engaged in establishing propositions of federal constitutional law in the first instance, but rather are enforcing legal standards that are already in existence. Their function is to state a legal standard accurately (at the level of generality it genuinely commands), not deliberately to state it inaccurately (by tying it to factual circumstances that are not material or, indeed, by attempting to err on the side of being too specific). In any case, Justice Scalia's argument has been rejected even in the context in which he has advanced it. Planned Parenthood v. Casey, 112 S.Ct. 2791, 2805 (1992)(joint opinion by O'Connor, Kennedy & Souter, J.J.).

reflected in the precedents can be "meaningfully distinguished" from the standard the prisoner asserts in federal habeas can the court conclude that that standard is new and thus unavailable. Id.

The inquiry into the content of a legal standard is "objective." Id., relying on Stringer v. Black, supra at 1140.[32] The mere existence of conflicting authorities is not conclusive. Nor is it decisive that

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[32] The Court has said that its approach to retroactivity "validates reasonable, good-faith" state decisions. Butler v. McKellar, supra at 414. Yet as the subsequent Stringer decision makes clear, that does not mean that the availability of a legal standard in federal habeas corpus turns on the subjective attitude of the state judges who previously found a prisoner's claim to be without merit. Teague has nothing to do with challenging the professionalism of state judges; it has everything to do with curing their honest mistakes with respect to existing federal law. References in some opinions to "good faith" and "subjectivity" cannot be understood to transform retroactivity anaylsis into an assessment of state judges' personal blameworthiness. E.g., Penry v. Lynaugh, supra at 350 (Scalia, J., dissenting); Truesdale v. Aiken, supra at 527 (Powell, J., dissenting).

previous opinions have characterized a case as either establishing a new rule or simply applying a settled legal standard to a different fact pattern. See Butler v. McKellar, supra at 415. Courts and judges, members of this Court included, sometimes make mistakes about an existing rule of law. A federal habeas court does not ineluctably create new law when it later identifies and applies the correct, settled standard. If that were true, then, again, the very purpose of the Griffith/Teague framework (the deterrence of such mistakes by state courts) would be frustrated.[33]

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[33] When an executive officer attempts to defeat liability for damages on the ground that he or she acted in "good faith," albeit in violation of a civil plaintiff's rights, the federal courts must determine whether, in light of the legal materials then in existence, the officer can be said to have acted "reasonably." In that context, too, this Court has counseled that previously prevailing legal standards should not be articulated at an unrealistically high "level of generality," because an inappropriate risk of liability might deter competent men and women from taking public jobs or, having taken

Moreover, courts typically insist that the results they reach are supported by precedent, the better to parry dissenters who typically insist that new law is being forged. It would be unrealistic to attach decisive import to such characterizations when they probably reflect disagreement about

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them, from performing their duties with appropriate zeal. Anderson v. Creighton, 483 U.S. 635, 639 (1987). It may well be that executive officers in the field cannot fairly be expected to parse dense legal materials and arrive at the correct understanding of prevailing law and that personal liability for damages may often be an unjustified penalty to be attached to the fault that can be ascribed to them. In any case, sensitive to the consequences of stating legal standards at a high level of generality in the qualified immunity context, the Court has effectively instructed the federal courts to err in the direction of being too specific. In habeas corpus, by contrast, the federal courts must identify legal standards at the correct level of generality. State judges whose erroneous judgments may be set at naught are not personally exposed to liability for their mistakes, and there is no analogous justification for giving them the benefit of the doubt. Rather, there is every reason for insisting that the state courts grasp federal law correctly in order to fulfill the purpose of habeas corpus as a safeguard against state failures to respect existing federal legal standards.

whether a legal standard is substantively sound rather than about whether, whatever its strengths or weaknesses, it is new.[34] What other judges have said about a legal standard is only evidence to be considered by the court charged to make its own, independent judgment on a "new rule" question.[35]

Finally, the federal court must apply the correct legal standard to the facts of the case at bar.

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[34] Cf. Forsyth County v. Nationalist Movement, 112 S.Ct. 2395, 2406 (1992) (Rehnquist, C.J., dissenting)(pointing out that "a mistaken allusion in a later case to the facts of an earlier case does not by itself undermine the holding of the earlier case").

[35] Judges can disagree both over whether a legal standard is sound and over whether it marks a significant departure from the past. What they say with respect to the former issue should not, for the reasons stated in the text, be mistaken for evidence regarding the latter issue. What they say regarding the latter, moreover, is merely evidence to be considered by the federal habeas court that has the duty to decide, as an independent federal question, whether the law has genuinely changed.

V. THE CLAIM PRESENTED BY THE RESPONDENT IN THIS CASE DOES NOT DEPEND ON A NEW RULE OF LAW WITHIN THE MEANING OF TEAGUE AND ITS PROGENY.

Approached in this way, the case at bar is not all so difficult. Stripped to the bone, Taylor's due process claim is that, having once established that he could not be convicted of murder if the jury was convinced that he killed his victim only when provoked into an intense passion, the state nonetheless refused to allow him to be heard before the jury on that question.

It has long been settled law that a defendant cannot be convicted of an offense if the trier of fact determines the existence of an affirmative defense recognized by state law. Taylor cites a host of precedents on this fundamental principle, including decisions rejecting conclusive presumptions in state criminal cases. The constitutional flaw in a conclusive presumption, of course, is that it withdraws from the trier of fact a

matter that must be determined against the accused in order to convict. Functionally, what happened in this case is precisely what happens in conclusive presumption cases: the jury was effectively directed to convict Taylor of murder, even if it was convinced that he had established the requisites for a manslaughter conviction. Yet under Illinois law, if the elements of manslaughter are found, a defendant cannot be convicted of murder.[36]

Taylor's current claim for federal habeas corpus relief does not depend on a legal standard for which the precedents on

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[36] Gilmore attempts unsuccessfully to characterize Taylor's claim as something more novel and also insists that erroneous jury instructions regarding a matter of state law cannot violate due process. That line of argument proves too much. The states rarely have an affirmative obligation to do anything. The very point of the due process clause is that, once a state chooses to create an entitlement as a matter of state law, it must administer that entitlement in a procedurally fair manner. Here again, the precedents in point are legion. E.g., Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

the books when his sentence became final cannot fairly be said to stand. The due process principle he asserts is not "new" within the meaning of Teague, and the federal habeas courts are thus empowered and obliged to enforce it de novo.

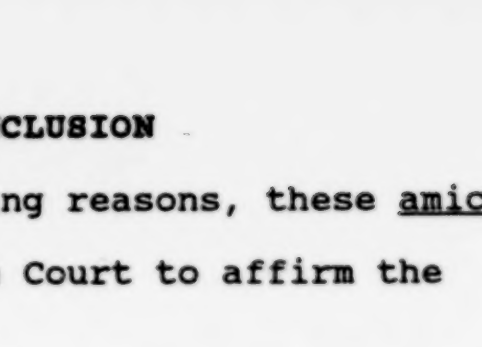
CONCLUSION

For the foregoing reasons, these amici respectfully ask the Court to affirm the judgment below.

Respectfully submitted,

George N. Leighton
111 West Washington St.
Suite 1700
Chicago, Illinois 60602
(312) 641-7144

George H. Kendall
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

By: 

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I have this day served three (3) copies of this brief amici curiae, by first-class mail, postage prepaid, upon each person listed below:

Steven J. Zick
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Lawrence C. Marshall
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60611

Dated this 8th day of January, 1993.